No. 99-1434-CFX Title: United States, Petitioner
v.
Mead Corporation

Docketed: March 1, 2000 Court: United States Court of Appeals for the Federal Circuit

Entry	Date	Proceedings and Orders
	Jan 18 2000	Application (99A585) to extend the time to file a petition for a writ of certiorari from January 30, 2000 to February 29, 2000, submitted to The Chief Justice.
	Jan 19 2000	Application (99A585) granted by the Chief Justice extending the time to file until March 1, 2000.
	Feb 29 2000	Petition for writ of certiorari filed. (Response due April 30, 2000)
	Mar 13 2000	Order extending time to file response to petition until April 30, 2000.
	Apr 28 2000	Brief of respondent Mead Corporation in opposition filed.
	May 1 2000	Brief amicus curiae of Customs and International Trade Bar Association filed.
	May 9 2000	Reply brief of petitioner United States filed.
	May 9 2000	DISTRIBUTED for Conference of May 25, 2000
	May 15 2000	Supplemental brief of respondent filed.
	May 30 2000	Petition GRANTED. SET FOR ARGUMENT November 8, 2000. **********
	Jun 29 2000	Motion of the Solicitor General to dispense with printing the joint appendix filed.
	Jul 14 2000	Brief of petitioner United States filed.
	Jul 14 2000	Brief amicus curiae of Thomas Merrill filed.
	Aug 14 2000	Brief amicus curiae of Joint Industry Group, et al. filed.
	Aug 14 2000	Brief amicus curiae of Tax Executives Institute filed.
	Aug 16 2000	Brief amicus curiae of American Association of Exporters and Importers filed.
	Aug 16 2000	Brief of respondent Mead Corporation filed.
	Aug 16 2000	Brief amici curiae of U.S. Association of Importers of Textiles & Apparel, et al. filed.
	Aug 16 2000	Brief amicus curiae of Filofax Inc. filed.
	Aug 16 2000	Brief amicus curiae of Customs and International Trade Bar Association filed.
	Aug 16 2000	Brief amici curiae of Cargill, Incorporated, et al. filed.
	Aug 28 2000	Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
	Aug 28 2000	Record filed.
	Aug 30 2000	Record filed.
	Sep 14 2000	Reply brief of petitioner United States filed.
	Sep 15 2000	CIRCULATED.
	Nov 8 2000	ARGUED.

(1)
Supreme Court, U.S.
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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

THE MEAD CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether classification rulings issued by the Customs Service are entitled to deference in determining the proper tariff classification of imported goods.

2. Whether the Customs Service reasonably interpreted the statutory phrase "diaries, notebooks and address books, bound" in Subheading 4820.10.20 of the Harmonized Tariff Schedule of the United States to include the spiral-bound and ring-bound day planners imported by respondent.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-16a) is reported at 185 F.3d 1304. The opinion of the Court of International Trade (App., *infra*, 19a-27a) is reported at 17 F. Supp. 2d 1004. The Customs Service ruling (App., *infra*, 28a-47a) that applies to this case is cited as HQ No. 955937 and is reported unofficially at 1994 WL 712863 (Customs).

JURISDICTION

The judgment of the court of appeals was entered on July 28, 1999. A petition for rehearing was denied on November 1, 1999 (App., *infra*, 17a). On January 19, 2000, the Chief Justice extended the time for filing a petition for a writ of certiorari to March 1, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. General Note 20 of the Harmonized Tariff Schedules of the United States, 19 U.S.C. 1202 (Supp. I 1995), provides in relevant part:

> The Secretary of the Treasury is hereby authorized to issue rules and regulations governing the admission of articles under the provisions of the tariff schedules. * * *

2. 19 U.S.C. 1502(a) provides in relevant part:

> The Secretary of the Treasury shall establish and promulgate such rules and regulations not inconsistent with the law (including regulations establishing procedures for the issuance of binding rulings prior to the entry of the merchandise concerned), and may disseminate such information as may be necessary to secure a just, impartial, and uniform appraisement of imported merchandise and the classification and assessment of duties thereon at the various ports of entry. * * *

3. 19 U.S.C. 1624 provides:

> In addition to the specific powers conferred by this chapter the Secretary of the Treasury is authorized to make such rules and regulations as

> may be necessary to carry out the provisions of this chapter.

4. For the period that this case involves, Subheading 4820.10.20 of the Harmonized Tariff Schedules of the United States, 19 U.S.C. 1202 (Supp. I 1995), provides a rate of duty of 3.2% for:

> Diaries, notebooks and address books, bound; memorandum pads, letter pads and similar articles
> * * *

5. 19 C.F.R. 177.9(a) provides in relevant part:

> *Effect of ruling letters generally.* A ruling letter issued by the Customs Service under the provisions of this part represents the official position of the Customs Service with respect to the particular transaction or issue described therein and is binding on all Customs Service personnel in accordance with the provisions of this section until modified or revoked. In the absence of a change of practice or other modification or revocation which affects the principle of the ruling set forth in the ruling letter, that principle may be cited as authority in the disposition of transactions involving the same circumstances. Generally, a ruling letter is effective on the date it is issued and may be applied to all entries which are unliquidated, or other transactions with respect to which the Customs Service has not taken final action on that date. * * *

6. 19 C.F.R. 177.10(a) provides in relevant part:

> *Generally.* Within 120 days after issuing any precedential decision under the Tariff Act of 1930, as amended, relating to any Customs transaction (prospective, current, or completed), the Customs Service shall publish the decision in the Customs

Bulletin or otherwise make it available for public inspection. For purposes of this paragraph a precedential decision includes any ruling letter, internal advice memorandum, or protest review decision. * * *

STATEMENT

This case concerns whether judicial deference is owed to the tariff classification rulings issued by the Customs Service under 19 U.S.C. 1502(a). That statute authorizes the Secretary of the Treasury to adopt "rules and regulations" providing for the issuance of such "binding rulings prior to the entry of the merchandise" as may "be necessary to secure a just, impartial, and uniform appraisement of imported merchandise and the classification and assessment of duties thereon * * * ." 19 U.S.C. 1502(a). Pursuant to that authority, the Secretary has provided for the issuance of tariff classification rulings by the Customs Service which are "binding on all Customs Service personnel" and which, "[i]n the absence of a change of practice or other modification or revocation which affects the principle of the ruling set forth in the ruling letter, * * * may be cited as authority in the disposition of transactions involving the same circumstances." 19 C.F.R. 177.9(a). In addition, the Customs Service is authorized to issue classification rulings in connection with specific merchandise already imported, 19 C.F.R. 177.11(a), and to issue decisions on protests from customs classification determinations, 19 U.S.C. 1515(a). The classification determinations set forth in such rulings and protest review decisions are also "precedential" in effect. 19 C.F.R. 177.10(a).

In the present case, the Federal Circuit held that these tariff classification rulings of the Customs Service

are to be given no judicial deference, and are instead to be disregarded utterly in interpreting the customs provisions. App., *infra*, 6a-7a. That holding warrants this Court's review.

1. Respondent imports "daily planners," which are "loose-leaf books containing calendars, room for daily notes, telephone numbers, addresses and notepads. This sort of product is probably best known under the trademark of Filofax." App., *infra*, 19a. Under Subheading 4820.10.20 of the Harmonized Tariff Schedule of the United States (HTSUS), 19 U.S.C. 1202 (Supp. I 1995), if such items are properly classified as "bound" "diaries," they are subject to an import duty of 3.2% of their value.[1] If, however, these items are not "bound" or are not "diaries," they would then fall under Subheading 4820.10.40 of the HTSUS as "[o]ther" items for which no duty applies. App., *infra*, 20a-21a, 24a.

In 1993, when respondent imported its daily planners into the United States, they were classified as "bound" "diaries" to which the 3.2% duty applied. Respondent filed an administrative protest of that classification. On October 21, 1994, the Customs Service issued a detailed denial of that protest in Headquarters Ruling (HQ) No. 955937, 1994 WL 712863 (Customs). App., *infra*, 28a-47a. That ruling noted that the issue presented by respondent "has been addressed in several rulings by this office" (*id.* at 31a-32a (citing, *e.g.*, Headquarters Ruling Letters (HRL) Nos. 955636, 1994 WL 220733 (Customs Apr. 6, 1994) and 955637, 1994 WL 220734 (Customs Apr. 6, 1994))):

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[1] The rate of duty on these items has been reduced since this case arose. It is currently 1.6%. HSTUS Subheading 4820.10.20, 19 U.S.C. 1202 (Supp. IV 1998).

> In these rulings this office has consistently determined that articles similar in design and/or function to the instant merchandise are classifiable as diaries. The rationale for this determination was based on lexicographic sources, as well as extrinsic evidence of how these types of articles are treated in the trade and commerce of the United States.

The agency noted that the text of Subheading 4820.10, "the common dictionary definition of 'diary', and past Customs rulings" all reflect that such daily planners are properly "classifiable as a diary." App., *infra*, 32a.

The Customs Service explained that the daily planners imported by respondent "fit squarely" within one of the definitions of the word "diary" contained in the *Oxford English Dictionary*—as "[a] book prepared for keeping a daily record, or having spaces with printed dates for daily memoranda and jottings." App., *infra*, 32a-33a. The Service rejected respondent's assertion that the agency should base its classification of such merchandise solely on the first enumerated definition of "diary" in one dictionary as "[a] daily record of events or transactions, a journal." *Id.* at 33a. The agency explained that "[m]any words have several definitions and Customs may consider any or all of them when making a classification determination." *Ibid.* The agency concluded that the broader definition of the term "diary" adopted in its rulings "reflects the common and commercial identity of these items in the marketplace"—a fact evidenced by the common usage of the term "desk diary" to describe the imported merchandise. *Id.* at 34a.

Noting that customs provisions commonly incorporate prevailing commercial usages, the agency concluded that "there are many forms of 'diaries'" and that

"the determinative criteria as to whether these types of articles are deemed 'diaries' for classification purposes is whether they are primarily designed for use as, or primarily function as, articles for the receipt of daily notations, events and appointments." App., *infra*, 39a-40a. Since the daily planners imported by respondent are designed for those exact functions, the agency concluded that they constitute "diaries" within the meaning of HTSUS 4820.10.20. *Id.* at 34a, 43a.

The Customs Service further concluded that the daily planners imported by respondent are "bound" within the meaning of the statutory classification provision. App., *infra*, 44a-47a. The agency emphasized that, in determining what constitutes a "bound" "diary," the traditional elements of formal "bookbinding" are not applicable. "The issue is not what constitutes a bound book, and there is no requirement that a diary be in the format of a book." *Id.* at 44a. Instead, the agency noted that the official explanation of the term "bound" in the notes of the Harmonized System Committee—the international authority that drafted this customs provision—states that the term "bound" includes "reinforcements or fittings of metal, plastics, etc." *Id.* at 45a. The Customs Service noted that "this language [is] indicative of the drafters' intent to include as bound any articles possessing ring binders or spiral binders." *Ibid.* The agency concluded that, "whether ring binder or spiral" binder is used, "pages held together in this manner" are "bound" for the purposes of this customs provision. *Id.* at 46a.

Since respondent's daily planners are bound in this very manner, the Customs Service ruled that these articles are "bound" "diaries" to which the 3.2% duty applied under HTSUS 4820.10.20. App., *infra*, 46a-47a.

Respondent did not seek judicial review of that classification decision.

2. Six months later, however, respondent imported additional articles of the same type. The agency again ruled that these daily planners are subject to duty as "bound" "diaries." Respondent then raised exactly the same protest that the agency had just reviewed and rejected in HQ No. 955937. When that protest was again denied by the agency, respondent brought this action in the United States Court of International Trade to seek review of the agency's classification determination. App., *infra*, 19a.

3. The Court of International Trade has exclusive jurisdiction to review the denial of a protest from a Customs Service classification decision. 28 U.S.C. 1581(a). On cross-motions for summary judgment, the court upheld the agency's determination in this case.

The court noted that respondent's daily planners were "designed for notations concerning the full range of daily experience" and that any "supplementary material" they contain does not alter their primary character as business diaries. App., *infra*, 25a. The court explained that its prior decisions in *Fred Baumgarten* v. *United States*, 49 Cust. Ct. 275 (1962), and *Brooks Bros.* v. *United States*, 68 Cust. Ct. 91 (1972), indicate that when, as here, "the diary portion was the essential or indispensable part of the importation," that is "controlling of its classification." App., *infra*, 22a. The court noted that the the current "tariff language" in the HSTUS was "adopted with knowledge of these judicial precedents." *Id.* at 23a

(citing *Central Prods. Co.* v. *United States*, 936 F. Supp. 1002, 1006-1007 (Ct. Int'l Trade 1996)).[2]

The court also upheld the conclusion of the Customs Service that respondent's diaries were "bound" for purposes of HTSUS 4820.10.20. The court explained that "[t]he common meaning of 'bound' is fastened. The irrevocability of the fastening is not important so long as it goes beyond the transitory role of packaging." App., *infra*, 26a.

4. The Federal Circuit has exclusive jurisdiction to review decisions of the Court of International Trade. 28 U.S.C. 1295(a)(5). On appeal from the decision in this case, the Federal Circuit reversed. App., *infra*, 1a-16a.

a. The court of appeals first addressed whether it would afford deference to the classification rulings of the Customs Service in determining the proper "meaning and scope of tariff terms." App., *infra*, 4a. The court noted that, in *United States* v. *Haggar Apparel Co.*, 526 U.S. 380, 391 (1999), this Court held that (App., *infra*, 5a):

> if an HTSUS provision is ambiguous and Customs promulgates a regulation that "fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design," courts should give that judgment "controlling weight" as articulated in

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[2] The Court of International Trade did not cite or rely upon the Headquarters Rulings (HQ No. 955937 and HRL Nos. 955636 & 955637) that the Customs Service issued to respondent in resolving this same issue in 1994. See page 5, *supra*. The court did, however, find support for its interpretation in a different Customs Service ruling, HQ No. 955199, 1994 WL 85353 (Customs Jan. 24, 1994), in which the agency explained the distinction between items that are "similar" to diaries (for which a duty applies) and "other" items (for which no duty is applicable). App., *infra*, 24a ("The rationale used in that ruling is persuasive * * * .").

Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 [1984].

The Federal Circuit reasoned, however, "that *Haggar*, and thus *Chevron* deference, does not extend to ordinary classification rulings [of the Customs Service]." *Ibid.* The court stated that deference is inappropriate for tariff classification rulings because those rulings are issued without the benefit of public comment, "do not carry the force of law and are not, like regulations, intended to clarify the rights and obligations of importers beyond the specific case under review."[3] *Id.* at 6a. The court stated that the "significant differences between Customs regulations and Customs rulings convince this court that *Haggar*'s reach does not extend to standard Customs rulings." *Id.* at 6a-7a.[4] The court of appeals concluded that it would therefore "continue[] to adhere to its [pre-*Haggar*] precedent giving no deference to such rulings." *Id.* at 7a (citing *Rollerblade, Inc.* v. *United States*, 112 F.3d 481, 484 (Fed. Cir. 1997)).[5]

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[3] In so stating, the court of appeals failed to consider or address the express language of the regulations which makes such rulings "binding on all Customs Service personnel" and which specifies that "the principle" of the rulings "may be cited as authority in the disposition of transactions involving the same circumstances." 19 C.F.R. 177.9(a). See also 19 C.F.R. 177.10(a) (protest review decisions are "precedential").

[4] The court compared Customs Service classification rulings to IRS interpretive rulings, which the court stated have no "binding effect" on the courts. App., *infra*, 7a (citing, *e.g.*, *B.F. Goodrich Co.* v. *United States*, 94 F.3d 1545, 1550 n.5 (Fed. Cir. 1996); *Trainer* v. *United States*, 800 F.2d 1086, 1090 n.7 (Fed. Cir. 1986)). But see note 6, *infra*.

[5] Under Customs Service regulations, a new interpretation that would increase the duty from that applicable under a prior interpretation may not be adopted without prior Federal Register notice and opportunity for public comment. 19 C.F.R. 177.10(c). The court of appeals reserved the question whether such revocation decisions would be entitled to deference under *Chevron*. App., *infra*, 6a n.1.

b. Having thus chosen simply to disregard the interpretive classification rulings of the Customs Service, the Federal Circuit found it unnecessary to address or consider the detailed reasoning adopted by the Customs Service in issuing the Headquarters Rulings that apply to the facts of this case. See pages 5-7, *supra*. The court instead looked primarily to what it regarded as an appropriate dictionary definition of the term "diary" in the *Oxford English Dictionary* and concluded that, to be a "diary," an item of merchandise must have "relatively extensive" space for the recording not only "of the events themselves, but also a person's observations, thoughts, or feelings about them." App., *infra*, 12a. Giving no weight to the common commercial use of the term "diary," the court expressed the view that a daily planner that contains "a place to jot down the date and time" of future appointments cannot qualify as a "diary" because the very essence of a "diary" is to be "retrospective, not prospective." *Id.* at 12a-13a.

Applying "the above principles," the court concluded that respondent's daily planners are not "diaries" within the meaning of HTSUS Subheading 4820.10.20 because (i) "the space provided" in those planners "would not permit a diarist to record relatively extensive notations about events, observations, feelings, or thoughts" and, (ii) while "[t]hese pages facilitate advance planning and scheduling[,] * * * a diary is not for planning." App., *infra*, 13a-14a.

c. The court of appeals further concluded that respondent's daily planners are not "bound" within the meaning of the HSTUS 4208.10.20. To determine the meaning of this customs provision, the court looked to a book publishing industry definition of a "bound book" as a book that is "sewn, glued, or stapled into permanent bindings." App., *infra*, 15a. The court stated that a diary may be considered as "bound" under this book publishing definition only if a "permanent" binding has been employed. *Ibid.* Because respondents' product is "contained in ringed loose-leaf binders" that lack the "permanent" character of a "bound book," the court held that these items are not "bound" within the meaning of the tariff provision. *Id.* at 15a-16a.

In reaching that conclusion, the court of appeals did not address the reasoning of the applicable Headquarters Rulings or of the authorities cited therein. In particular, the court of appeals did not acknowledge or discuss the official interpretive statements of the Harmonized System Committee (which drafted these tariff provisions) which explain that the term "bound" "diaries" as used in HTSUS 4820.10.20 includes diaries that are bound with metal fittings, such as rings or spirals. See App., *infra*, 45a; page 7, *supra*.

d. The court of appeals held that, since respondents' daily planners are similar to, but are not, "bound" "diaries" within the meaning of this tariff provision, they are to be "classified under the 'other' subheading of [HTSUS] 4820.10.40," for which no duty applies. App., *infra*, 16a. The United States filed a timely petition for rehearing with suggestion for rehearing en banc. A response to the petition was requested by the court from respondent. The court thereafter denied the petition without a published vote. *Id.* at 17a.

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals departs from the consistent decisions of this Court and other courts of appeals that accord deference to the formal interpretations of statutes adopted by the agencies charged with their implementation. By denying deference to the Customs Service rulings that interpret and apply the detailed classification provisions of the Tariff Act, the decision in this case has left importers and the Customs Service without effective guidance for a wide range of transactions. Under the decision in this case, the ultimate application of customs provisions often cannot be determined or even reliably predicted except upon completion of judicial proceedings that occur well after the relevant transactions have been planned and conducted. By authorizing the agency to issue, in advance, "binding rulings prior to the entry of the merchandise," 19 U.S.C. 1502(a), and to issue precedential protest review decisions, 19 U.S.C. 1515(a), Congress sought to avoid the very uncertainty and wasteful litigation that the decision in this case promotes.

The petition for a writ of certiorari should be granted because of the clear departure of the decision below from the standards of deference required by the decisions of this Court and because of the exceptional importance of the questions presented to the planning of commercial transactions and to the administration of the customs laws.

1. a. It has long been a bedrock legal principle that courts are to accord deference to the formal interpretations of a statute adopted by the agency that has been "charged with responsibility for administering the provision" by Congress. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837,

865 (1984). See, *e.g.*, *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 739 (1996) ("It is our practice to defer to the reasonable judgments of agencies with regard to the meaning of ambiguous terms in statutes that they are charged with administering."); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *McLaren* v. *Fleischer*, 256 U.S. 477, 481 (1921); *Brown* v. *United States*, 113 U.S. 568, 570-571 (1885); *Edwards's Lessee* v. *Darby*, 25 U.S. (12 Wheat.) 206, 209-210 (1827). The deference that this Court has consistently accorded to agency interpretations in decisions such as *Chevron* is fully applicable here.

Congress has authorized the agency to adopt such "binding rulings prior to the entry of the merchandise" as may "be necessary to secure a just, impartial, and uniform appraisement of imported merchandise and the classification and assessment of duties thereon * * * ." 19 U.S.C. 1502(a). Congress has further specified that, under the "rules and regulations prescribed by the Secretary," the Customs Service is to determine "the final appraisement of merchandise" and "fix the final classification and rate of duty applicable to such merchandise," 19 U.S.C. 1500(a), (b), and is then to issue decisions on any protests from such classification determinations, 19 U.S.C. 1515(a). In view of these broad delegations of authority, Congress emphasized in enacting the Harmonized Tariff Schedule of the United States in 1988 that "[t]he Customs Service will be responsible for interpreting and applying" this statute. H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 549-550 (1988).

The reasoning of *Chevron* thus applies directly here. Courts are to defer to the agency's reasonable interpretation of the statute it administers because of the "presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency,

understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-741 (1996).

b. This Court has not limited application of this principle of judicial deference solely to agency interpretations that are set forth in formal regulations. Instead, deference has been extended whenever the Court is satisfied that the interpretation "reflect[s] the agency's fair and considered judgment on the matter in question." *Auer* v. *Robbins*, 519 U.S. 452, 462 (1997) (agency litigation brief). See also *Reno* v. *Koray*, 515 U.S. 50, 61 (1995) (internal agency guidelines); *Shalala* v. *Guernsey Mem. Hosp.* 514 U.S. 87, 99 (1995) (agency's program manual); *Martin* v. *Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 157 (1991) (agency's administrative litigating position); *Gardebring* v. *Jenkins*, 485 U.S. 415, 429-430 (1988) (government's litigation position).

The Federal Circuit, however, has recently been reluctant to accept application of the judicial deference principles of *Chevron* to cases involving the collection of customs duties. In a line of cases that began in *dicta* in *Crystal Clear Industries* v. *United States*, 44 F.3d 1001, 1003 * (Fed. Cir. 1995), and culminated in *Rollerblade, Inc.* v. *United States*, 112 F.3d 481, 484 (Fed. Cir. 1997), the Federal Circuit has declined to give any deference to the agency's interpretations of the customs laws. This Court unanimously rejected those recent holdings of the Federal Circuit in *United States* v. *Haggar Apparel Co.*, 526 U.S. 380, 391-392 (1999). In *Haggar*, the Court held that, when "the agency's statutory interpretation 'fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design,

we give [that] judgment "controlling weight."'" *Id.* at 392 (quoting *NationsBank of North Carolina, N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995) (quoting *Chevron*, 467 U.S. at 844)).

In the present case, however, instead of following the directives of *Chevron* and *Haggar*, the court of appeals stated that it would "continue[] to adhere to its precedent giving no deference to such rulings." App., *infra*, 7a (citing *Rollerblade, Inc.* v. *United States*, 112 F.3d at 484). The court stated that its refusal to follow *Chevron* and *Haggar* in the present case was justified by the difference "between Customs regulations [involved in *Haggar*] and customs rulings [involved in this case]" (App., *infra*, 6a). The court's holding that no deference is owed to administrative interpretations unless they are set forth in formal regulations, however, squarely conflicts with the decisions of this Court and other courts of appeals.

For example, in *NationsBank of North Carolina, N.A.* v. *Variable Annuity Life Insurance Co.*, 513 U.S. at 257—which this Court prominently cited and quoted in *Haggar*, 526 U.S. at 391-392—the Court held that deference must be given to "an expert administrator's statutory exposition" even though the agency's interpretation was not set forth in any regulation or formal ruling. The Court held that, because the administrator's "construction of the Act is reasonable," it "warrants judicial deference." 513 U.S. at 254. See also *Auer* v. *Robbins*, 519 U.S. at 462; cases cited page 15, *supra*.[6] And, in a decision that applies directly to this

[6] The Federal Circuit manifestly erred in suggesting that deference may not be owed to Revenue Rulings issued under the Internal Revenue Code. See App., *infra*, 7a. In *United States* v. *Correll*, 389 U.S. 299, 302 n.10 (1967), this Court reviewed a

case, the Court in *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978), upheld a Treasury ruling that interpreted the countervailing duty provisions of the Tariff Act—even though that ruling was not contained in a notice-and-comment regulation. The Court concluded that the agency's "longstanding and consistent administrative interpretation is entitled to considerable weight" and should be sustained if it reflects a "sufficiently reasonable" elaboration of the statutory scheme. *Ibid.*

The Federal Circuit's determination to give *no* deference to the agency's reasonable exposition of the statute in this case thus directly conflicts with *Zenith Radio*, as well as with *Haggar* and *Chevron*. It also conflicts with the decisions of numerous courts of appeals holding that agency interpretations adopted by means other than formal regulations are entitled to

Revenue Ruling that interpreted a provision of the Code that concerned a deduction for business expenses incurred away from home. The Court held that, although "[a]lternatives to the Commissioner's * * * rule are of course available," the agency's interpretation must be upheld when it is "reasonable" because "Congress has delegated to the Commissioner, not to the courts, the task of prescribing 'all needful rules and regulations for the enforcement' of the Internal Revenue Code. 26 U.S.C. § 7805(a)." 389 U.S. at 306-307. The Court held in *Correll* that, "[i]n this area of limitless factual variations, 'it is the province of Congress and the Commissioner, not the courts, to make the appropriate adjustments.'" 389 U.S. at 307 (quoting *Commissioner* v. *Stidger*, 386 U.S. 287, 296 (1967)). In *Davis* v. *United States*, 495 U.S. 472, 484 (1990), the Court further explained that, while revenue rulings "do not have the force and effect of regulations," the "agency's interpretations and practices" are nonetheless to be given "considerable weight" when "they involve the contemporaneous construction" of the statute or "have been in long use." *Ibid.* The Federal Circuit erred in ignoring this longstanding precedent in stating its opposite view in this case.

judicial deference. See, *e.g.*, *Auer* v. *Robbins*, 519 U.S. at 462; *Association of Bituminous Contractors, Inc.* v. *Apfel*, 156 F.3d 1246, 1251-1252 (D.C. Cir. 1998); *Gould* v. *Shalala*, 30 F.3d 714, 719-720 & n.7 (6th Cir. 1994); *State of Georgia, Dep't of Med. Assistance* v. *Shalala*, 8 F.3d 1565, 1571 n.8 (11th Cir. 1993); *Coca Cola Co.* v. *Atchison, Topeka, & Sante Fe Ry.*, 608 F.2d 213, 215 (5th Cir. 1979). See also *Elizabeth Blackwell Health Ctr. for Women* v. *Knoll*, 61 F.3d 170, 181-182 (3d Cir. 1995) (according deference to agency policy statement), cert. denied, 516 U.S. 1093 (1996); *Emerson* v. *Steffen*, 959 F.2d 119, 122 (8th Cir. 1992) (same).

The courts of appeals have described more than one standard of judicial deference for the various types of agency interpretations that are not set forth in formal regulations. Compare, *e.g.*, *First Chicago NBD Corp.* v. *Commissioner*, 135 F.3d 457, 459 (7th Cir. 1998); *Martinez* v. *Flowers*, 164 F.3d 1257, 1260 (10th Cir. 1998); *Washington* v. *HCA Health Servs. of Texas, Inc.*, 152 F.3d 464, 469 (5th Cir. 1998); *Reich* v. *John Alden Life Ins. Co.*, 126 F.3d 1, 7 (1st Cir. 1997); *New York City Health & Hosps. Corp.* v. *Perales*, 954 F.2d 854, 861 (2d Cir. 1992). See also *Merck & Co.* v. *Kessler*, 80 F.3d 1543, 1550 (Fed. Cir. 1996). All courts of appeals *other* than the Federal Circuit, however, accord either substantial weight or controlling weight to the formal rulings issued by an agency's headquarters for guidance to the public.[7] No court of appeals has joined the

[7] For example, in *Ritter* v. *Cecil County Office of Housing & Community Development*, 33 F.3d 323, 328 (4th Cir. 1994), the court explained that "[a]lthough less deference may be due when considering an agency's interpretative rules than when a federal agency adopts regulations through the official rulemaking process, * * * the nature of our inquiry * * * is quite similar." See also *Warder* v. *Shalala*, 149 F.3d 73, 57 (1st Cir. 1998) (it is not necessary to choose between *Chevron* and *Skidmore* formulations when the government's interpretation prevails under either), cert. denied, 119 S. Ct. 1455 (1999); *Wilshire Westwood Assocs.* v. *Atlantic Richfield Corp.*, 881 F.2d 801, 809 (9th Cir. 1989).

Federal Circuit in categorically disqualifying from *any* deference the entire body of an agency's formal interpretative rulings that are not contained in the agency's notice-and-comment regulations.[8] The uniquely nondeferential treatment afforded by the Federal Circuit to administrative interpretations—arising in a court of appeals whose central function is to review actions taken by federal agencies—warrants review by this Court.

2. Under the proper standard of deference that applies to agency interpretations of the "statutes that they are charged with administering" (*Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. at 739), the Customs Service classification ruling should have been sustained in this case. The Headquarters Rulings at issue in this case were not sparsely explained or hidden from public view. See App., *infra*, 28a-47a. To the contrary, the agency's rulings set forth a significantly more refined, and less wooden, interpretation of the statutory language than is manifested in the decision of the court of appeals.

The tariff classification issue in this case requires interpretation of two terms in Subheading 4820.10.20 of the HTSUS—"diaries" and "bound." The court of appeals refused to consider the detailed Headquarters Rulings (HQ No. 955937 and HRL Nos. 955636, 955637)

[8] This Court has made clear that the procedure chosen by a federal agency—rulemaking *versus* adjudication—is a matter properly left to the discretion of the agency. See *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 292-293 (1974); *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202 (1947).

issued by the Customs Service that have "consistently determined that articles similar in design and/or function to the instant merchandise are classifiable as diaries." App., *infra*, 31a. In these rulings, the Service has rejected respondent's reliance on narrowly selected dictionary definitions, noting that "[m]any words have several definitions and Customs may consider any or all of them when making a classification determination." *Id.* at 33a.[9] In particular, the Customs Service has explained that reliance on any single, narrow definition is inconsistent with the commercial context in which the tariff provisions apply: business "diaries" are a recognized commercial product and this "broader concept of diary * * * reflects the common and commercial identity of these items in the marketplace." *Id.* at 34a.[10]

The Customs Service has also properly concluded that these daily planners are "bound" for purposes of HTSUS 4820.10.20. App., *infra*, 44a-46a. The Customs Service disagreed with respondent's contention that a definition of a "bound book" from the publishing industry controls in determining whether a "diary" is "bound" under this Subheading. "The issue is not what constitutes a bound book, and there is no requirement that a diary be in the format of a book." *Id.* at 44a. The Service instead relied on the Harmonized Commodity

[9] The Customs Service correctly noted that "the narrower definition of 'diary', as set forth in the *Oxford English Dictionary's* first definition, connotes an article containing blank pages used to record extensive notations of one's daily activities. This is not the sole format for a diary." App., *infra*, 33a.

[10] The Customs Service found additional support for this functional approach in the precedents of the former Customs Court. App., *infra*, 36a-40a (citing *Fred Baumgarten* v. *United States*, 49 Cust. Ct. 275 (1962), and *Brooks Bros.* v. *United States*, 68 Cust. Ct. 91 (1972)).

Description and Coding System Explanatory Notes—"which represent the official interpretation of the HTS at the international level"—which state that "goods of this heading may be bound with materials other than paper (e.g., leather, plastics or textile material) and have reinforcements or fittings of metal, plastics, etc." *Id.* at 45a. The agency concluded that this official explanation makes it "clear that the Harmonized System Committee contemplated metal binders as being within this heading's definition of bound articles." *Ibid.* The conclusion that respondent's daily planners are "bound" under this Subheading not only comports with the official interpretation of the drafting authority, it also makes "semantic" sense: "[A] binder, whether a ring binder or spiral, is that which binds pages together in a fixed order. Pages held together in this manner are bound, and the diary is therefore deemed a bound article." *Id.* at 46a.

The court of appeals did not suggest that the agency's thorough, well-formulated interpretation of the statute is not a reasonable elaboration of its provisions. Instead, the court of appeals simply displaced the agency's reasonable interpretation of the Tariff Act with another perhaps plausible interpretation of its own. See pages 5-7, 9-12, *supra*.[11] That action by the court of appeals was in error: "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467

[11] In view of the fact that the court of appeals declined to consider industry usage, and failed to address the official interpretation of the tariff provision by the international drafting authority, it could fairly be questioned whether the decision of the court of appeals itself bears the indicia of a "reasonable" elaboration of the statute. See page 9-12, *supra*.

U.S. at 843. When, as in this case, the agency's interpretation "defines a term in a way that is reasonable in light of the legislature's revealed design," the agency's judgment is to be given "controlling weight." *Nationsbank of North Carolina, N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. at 257.

3. The refusal of the court of appeals to defer to the agency's interpretations of the detailed classification provisions of the Tariff Act has substantial practical importance. The agency has routinely employed rulings, rather than regulations, to address application of the detailed customs provisions to the "limitless factual variations" created by modern commerce (*United States* v. *Correll*, 389 U.S. at 307). By denying deference to the agency's interpretations of these intricate provisions, the Federal Circuit has left both importers and the Customs Service without effective guidance for a wide range of transactions. The result of the ad hoc approach adopted in this case is expensive customs litigation and unpredictable outcomes.

There is nothing unique about the Customs Service, or the scheme of judicial review to which its rulings and decisions are subject, that would justify the anomalous regime imposed by the court of appeals. Deference to the views of the federal officials who administer tariff legislation is not new; it dates to the beginning of the customs laws and is thus as old as the Republic itself. See *Zenith Radio Corp.* v. *United States*, 437 U.S. at 450; *United States* v. *Vowell*, 9 U.S. (5 Cranch) 368, 372 (1809). Indeed, until quite recent times, the Federal Circuit and the Court of International Trade had consistently accorded deference to administrative interpretations in customs litigation. See, *e.g.*, *Guess? Inc.* v. *United States*, 944 F.2d 855, 858 (Fed. Cir. 1991); *Generra Sportswear Co.* v. *United States*, 905 F.2d 377, 379 (Fed. Cir. 1990); *Mitsui Foods, Inc.* v. *United States*, 867 F.2d 1401, 1403 & n.3 (Fed. Cir. 1989); *DAL-Tile Corp.* v. *United States*, 829 F. Supp. 394 (Ct. Int'l Trade 1993). See also Re, *Litigation Before the United States Court of International Trade*, 19 U.S.C.A. §§ 1-1300, Cum. Ann. Pocket Part, at XI, XL-XLI (1998). The Federal Circuit's recent departure from this traditional standard of deference is a development that this Court rejected in *Haggar*, 526 U.S. at 391-392 (citing *Rollerblade*, *supra*, with disapproval).

Absent review by this Court, however, the decision in this case—which seeks to revive the views rejected in *Haggar*—will have binding effect throughout the Nation. That is because the Court of International Trade has exclusive jurisdiction over customs cases, and the Federal Circuit has exclusive jurisdiction over appeals from the Court of International Trade. In similar circumstances, this Court has recognized the need for plenary review of Federal Circuit decisions of significant fiscal and administrative importance. See, *e.g.*, *United States* v. *Hill*, 506 U.S. 546, 549 (1993); *United States* v. *Goodyear Tire & Rubber Co.*, 493 U.S. 132, 138 (1989); *United States* v. *American Bar Endowment*, 477 U.S. 105, 109 (1986). Such review is appropriate in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

No. 98-1569

THE MEAD CORPORATION, PLAINTIFF-APPELLANT

v.

UNITED STATES, DEFENDANT-APPELLEE

July 28, 1999

Before NEWMAN, RADER, and SCHALL,
Circuit Judges.

RADER, Circuit Judge.

On summary judgment, the Court of International Trade affirmed the United States Customs Service's classification of day planners imported by The Mead Corporation as bound diaries. Because the terms within subheading 4820.10.20 of the Harmonized Tariff Schedules of the United States (HTSUS), namely "diaries" and "bound," do not encompass the imported articles, this court reverses.

I.

At issue are five models of Mead's day planners (model nos. 47192, 47062, 47124, 47104, and 47102). Stylistically, the day planners differ from each other based on their size (ranging from 7 1/2" x 4 3/8" to 12" x 10 5/8"), outer jacket cover material, and type of closure. The basic model contains a calendar, a section for daily notes, a section for telephone numbers and addresses, and a notepad. The larger models contain the features of the basic model and additional items such as a daily planner section, plastic ruler, plastic pouch, credit card holder, and computer diskette holder. A loose-leaf ringed binder holds the contents of the day planner, except for the notepad, which fits into the rear flap of the day planner's outer cover.

In a January 11, 1993 ruling, Customs classified the subject planners as bound diaries under subheading 4820.10.20 (emphasis added):

> 4820 Registers, account books, notebooks, order books, receipt books, letter pads, memorandum pads, *diaries and similar articles*, exercise books, blotting pads, binders (looseleaf or other), folders, file covers, manifold business forms, interleaved carbon sets and other articles of stationery, of paper or paperboard; albums for sample or for collections and book covers (including cover boards and book jackets) of paper or paperboard:

> 4820.10 Registers, account books, notebooks, order books, receipt books, letter pads, memorandum pads, *diaries and similar articles*:
>
> 4820.10.20 *Diaries*, notebooks and address books, *bound*; memorandum pads, letter pads and similar articles

Moving for summary judgment in the trial court, Mead attacked Customs' ruling on two grounds. Mead argued that (1) the articles were not diaries, and (2) the articles were not bound. Either contention, if accepted, compels classification under the "other" provision of subheading 4820.10.40. Under that subheading, Mead would owe no tariff on the imported articles, in contrast with the 4.0% tariff assessed in Customs' 1993 ruling. In support of its motion, Mead submitted dictionary definitions of the terms at issue, affidavits from seven individuals from the U.S. stationery goods industry, and affidavits from two bookbinding experts. The government cross-moved for summary judgment in support of Customs' classification, offering its own definitions of "diary" and "bound," and submitting supporting affidavits.

In a July 14, 1998 opinion (No. 98-101), the trial court granted the government's motion. The Court of International Trade broadly defined "diaries" as "articles whose principle purpose is to allow a person to make daily notations concerning events of importance." Using that definition, the trial court decided that Mead's day planners qualify as diaries even though they admittedly contain "supplementary material," that is, non-diary elements such as a section for addresses and telephone numbers. With respect to the term "bound," the trial court opined: "The common meaning

of 'bound' is fastened. The irrevocability of the fastening is not important so long as it goes beyond the transitory role of packaging." Using that broad meaning for "bound," the trial court found that Mead's day planners, whose contents fit in a loose-leaf ringed binder, fall within that definition.

On appeal, Mead contests the trial court's definitions of "diaries" and "bound." Mead contends that "diaries" means: "A book for recording a person's observations, thoughts and/or events." Mead further contends that an item is "bound" only when "permanently secured along one edge between covers in a manner traditionally performed by a bookbinder."

II.

This court reviews the Court of International Trade's grant of summary judgment without deference. *See Sharp Microelecs. Tech., Inc. v. United States*, 122 F.3d 1446, 1449 (Fed. Cir. 1997). Where, as here, the parties do not dispute material facts regarding the imported goods, the analysis of whether the trial court properly classified the goods collapses into a determination of the proper meaning and scope of the HTSUS terms. *See SGI, Inc. v. United States*, 122 F.3d 1468, 1471 (Fed. Cir. 1997).

The Supreme Court's recent pronouncement in *United States v. Haggar Apparel Co.*, 526 U.S. 380, 119 S. Ct. 1392, 143 L.Ed.2d 480 (1999) has raised questions concerning the standard of review applicable to determinations of the meaning and scope of tariff terms. *See Avenues in Leather, Inc. v. United States*, 178 F.3d

1241, 1999 WL 342226, at *2 (Fed. Cir. May 20, 1999). The meaning of a tariff term, a matter of statutory interpretation, is a question of law. *See Bauerhin Tech. v. United States*, 110 F.3d 774, 776 (Fed. Cir. 1997). Accordingly, this court has previously accorded Customs' classification rulings no deference. *See Rollerblade, Inc. v. United States*, 112 F.3d 481, 483-84 (Fed. Cir. 1997). In *Haggar*, however, the Supreme Court held that if an HTSUS provision is ambiguous and Customs promulgates a regulation that "fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design," courts should give that judgment "controlling weight" as articulated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984). *Haggar*, 119 S. Ct. at 1399. Thus this court must decide whether that decision applies in this case where Customs has not issued a regulation, but has merely issued a classification ruling implicitly interpreting an HTSUS provision. For the reasons articulated below, this court determines that *Haggar*, and thus *Chevron* deference, does not extend to ordinary classification rulings.

The United States Code has specifically given Customs the power to promulgate regulations. *See* 19 U.S.C. § 1502(a) (1994). Where, as in *Haggar*, Customs issues a regulation under the procedural rigors dictated by the Administrative Procedure Act, *see* 5 U.S.C. § 553 (1994), that regulation has the enforceability of law. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 295, 99 S. Ct. 1705, 60 L.Ed.2d 208 (1979); Bernard Schwartz, *Administrative Law* 182-83 (3d ed. 1991). A regulation, however, must first undergo a notice and comment period during which the interested public can "parti-

cipate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(c). Moreover, even after promulgation, a regulation is subject to petitions in which interested persons may seek to amend or repeal the new policy. *See* 5 U.S.C. § 553(e). A regulation that endures this process carries the full weight of Customs' rulemaking authority. *See Parker v. Office of Personnel Management*, 974 F.2d 164, 166 (Fed. Cir. 1992) (recognizing that by enacting regulations, agencies put a "gloss" on their statutory interpretations). A regulation thus represents a reasoned and informed articulation of Customs' statutory interpretation, which serves to "clarify the rights and obligations of importers." *Haggar*, 119 S. Ct. at 1398.

In contrast, such procedural safeguards do not accompany typical Customs rulings.[1] The process of such rulings, for example, does not involve public debate or discussion, but is confined to the specific facts of and parties to the particular transaction at issue. *See* 19 C.F.R. § 177.0, 177.1(a) (1998). Moreover, Customs rulings do not carry the force of law and are not, like regulations, intended to clarify the rights and obligations of importers beyond the specific case under review. Instead, a ruling merely interprets and applies Customs laws to "a specific set of facts." 19 C.F.R. § 177.1(d)(1) (defining "ruling"). These significant differences between Customs regulations and Customs rulings convince this court that *Haggar*'s reach does not

[1] Certain rulings—specifically, those which have the "effect of changing a practice"—undergo notice-and-comment procedures. 19 C.F.R. § 177.10(c) (1998). This case does not involve such a ruling, and this court expresses no opinion as to what level of deference, if any, would apply in that circumstance.

extend to standard Customs rulings. Accordingly, this court continues to adhere to its precedent giving no deference to such rulings. *See Rollerblade*, 112 F.3d at 484.

In reaching this conclusion, this court also finds apt the Supreme Court's analogy in *Haggar* between trade and tax matters. *See Haggar*, 119 S. Ct. at 1400. The Supreme Court has decided that Treasury regulations interpreting tax statutes deserve deference. *See Atlantic Mut. Ins. Co. v. Commissioner*, 523 U.S. 382, 389, 118 S. Ct. 1413, 140 L.Ed.2d 542 (1998) (when a term in the Internal Revenue Code is ambiguous, "the task that confronts us is to decide, not whether the Treasury regulation represents the best interpretation of the statute, but whether it represents a reasonable one."); *see also Schuler Indus., Inc. v. United States*, 109 F.3d 753, 755 (Fed. Cir. 1997). Internal Revenue Service (IRS) interpretive rulings, in contrast, "do not have the force and effect of regulations." *Commissioner v. Schleier*, 515 U.S. 323, 336 n. 8, 115 S. Ct. 2159, 132 L.Ed.2d 294 (1995). Accordingly, this court has not afforded them *Chevron* deference. *See B.F. Goodrich Co. v. United States*, 94 F.3d 1545, 1550 n. 5 (Fed. Cir. 1996) ("We recognize, however, that IRS Revenue Rulings have no binding effect on this court."); *Trainer v. United States*, 800 F.2d 1086, 1090 n. 7 (Fed. Cir. 1986) (noting that "Treasury Regulations are of greater force and effect than Revenue Rulings.").

Customs' classifications rulings are in some ways an even less formalized body of interpretation than IRS revenue rulings. IRS revenue rulings, for example, issue from a single body—the IRS's National Office—and appear in the Internal Revenue Bulletin.

See 26 C.F.R. § 601.201(6) (1998). Customs' rulings, in contrast, issue not only from Customs Headquarters, but from each port office of the Customs Service. *See* 19 C.F.R. § 177.2(b)(2)(ii)(B). Moreover, while Customs may publish its rulings in the Customs Bulletin, the regulations do not require it to do so. *See* 19 C.F.R. § 177.10(a). In short, the parallels between IRS Revenue Rulings and Customs rulings further convince this court that the latter, like the former, do not require *Chevron* deference.

III.

This court construes a tariff term according to its common and commercial meanings, which it presumes are the same. *See Simod Am. Corp. v. United States*, 872 F.2d 1572, 1576 (Fed. Cir. 1989). To ascertain the common meaning of a tariff term, this court has consulted dictionaries, scientific authorities, and other reliable information sources. *See C.J. Tower & Sons v. United States*, 69 C.C.P.A. 128, 673 F.2d 1268, 1271 (1982).

A. Diaries

The trial court gleaned its broad meaning of diaries from three prior cases. In *Baumgarten v. United States*, 49 Cust.Ct. 275, 1962 WL 10886 (1962), the court considered a plastic-covered book, 4 1/4 "by 7 3/8", having pages for addresses and telephone numbers followed by ruled pages allocated to the days of the year and the hours of the day. Calendars for the current and following months headed the ruled pages. The importer invoiced the articles as "desk-diaries." In classifying them as diaries rather than as "other blank

books and slate books," the court looked first to the definition of a diary in *Webster's New International Dictionary of the English Language* (2d ed. 1951): "A register of daily events or transactions; a daily record; journal; esp., a book for personal notes or memoranda, or for details of experiences or observations of the writer; also, a blank book for daily memoranda." *Id.* at 276. From this definition, the court decided:

> [T]he particular distinguishing feature of a diary is its suitability for the receipt of daily notations. . . . By virtue of the allocation of spaces for hourly entries during the course of each day of the year, the books are designed for that very purpose. That the daily events to be chronicled may also include scheduled appointments would not detract from their general character as appropriate volumes for the recording of daily memoranda.

Id.

In *Brooks Brothers v. United States*, 68 Cust. Ct. 91 (1972), the court considered an "Economist Diary," a 10" by 8" spiral bound article, covered in red leather, with fine plate-finish parchment. The importer did not dispute that the Diary was composed in part of pages suitable for use as a diary, but argued that the Diary also contained printed informational material such as maps and thus could not be classified as "Blank books, bound: Diaries." Discussing *Baumgarten*, the court noted: "Judicial authority, therefore, has adopted the crux of the lexicographic definitions that the 'particular distinguishing feature of a diary is its suitability for the receipt of daily notations.'" *Brooks Brothers*, 68 Cust. Ct. at 97. The court concluded that although the informational pages added to the usefulness or value of the

article, the diary portion of the Economist Diary, "clearly 'suitable for the receipt of daily notations,'" was essential. *Brooks Brothers*, 68 Cust. Ct. at 97-98.

Finally, in *Charles Scribner's Sons v. United States*, 574 F. Supp. 1058, 6 C.I.T. 168 (1983), the court classified an "Engagement Calendar," a 9 3/8" by 6 1/2" spiral bound article with photographs on the left side and a table of the days of the week on the right, as a calendar rather than a diary. It acknowledged the *Baumgarten* and *Brooks Brothers* cases, but decided that, in contrast to a diary which is "primarily intended to be used in connection with extensive notations," the article at issue was intended only "for a notation of no more than a sentence or two." *Id.* at 175, 574 F. Supp. at 1063.

The trial court in this case relied heavily on these cases for its definition of diaries. These cases, however, involved classification of goods under tariff provisions different from those presented in this case. These prior cases therefore supply only limited guidance for this case. In *Charles Scribner's Sons*, for instance, the court decided between classifying the articles as calendars or diaries. Neither party to this case asserts that the day planners should be classified as calendars. In *Baumgarten*, the court classified the articles at issue under the Tariff Act of 1930, which as then amended provided sparse guidance under Schedule 14 ("Papers and Books"):

Blank books and slate books:

Address books, diaries, and notebooks

Other

Similarly the court in *Brooks Brothers* decided its case with similarly sparse guidance from the predecessor to tariff provision 4820.10.20 in the Tariff Schedule of the United States (TSUS):

Schedule 2. Wood and Paper; Printed Matter

Part 4. Paper, Paperboard, and Products Thereof

Subpart C. Paper and Paperboard Cut to Size or

Shape; Articles of Paper and Paperboard

Blank books, bound:

256.56 Diaries, notebooks, and address books

256.58 Other

Neither of these prior incarnations of the tariff schedule contain the specificity found in the corresponding HTSUS headings. The more precise HTSUS classification scheme, which distinguishes diaries from articles similar to diaries, necessitates a more precise definition of the terms at issue. Stated another way, while the blunt dividing line used in *Baumgarten* and *Brooks Brothers* may have sufficed to distinguish diaries from other blank books, this court must draw the line distinguishing diaries from articles similar to diaries with a finer point.

The *Oxford English Dictionary*, at 612 (1989), defines a diary as: "1. A daily record of events or transactions, a journal; specifically, a daily record of matters affecting the writer personally, or which come under his personal observation." This definition largely comports with the definition cited in *Baumgarten* and with other dictionary definitions. The *American Heritage Dictionary of the English Language*, at 516 (3d ed. 1992), for example, defines a diary as: "1. A daily record, especially a personal record of events, experiences, and observations, a journal." *See also Webster's New Twentieth Century Dictionary of the English Language* at 504 (2d ed. 1961) ("1. a daily written record, especially of the writer's own experiences, thoughts, etc."). These definitions reflect the two key aspects of a diary.

A diary must allow its user to keep a record, especially, as the Court of International Trade recognized, "concerning events of importance." Thus, a diary would include not only a factual record of the events themselves, but also a person's observations, thoughts, or feelings about them. This court disagrees with the trial court, however, that the record may be composed of the broad range of writings embraced by the term "notations." That term encompasses the use of only a word or even the briefest phrase—writings of a length insufficient to record events, observations, thoughts, or feelings. To constitute a record at all, then, the notations must be relatively extensive. In the words of *Charles Scribner's Sons*, the article must have space for "more than a sentence or two." 574 F.Supp. 1058, 6 CIT at 175.

In addition, a diary must actually be a "record" in the sense that it "recalls or relates *past* events." *Webster's*

Ninth New Collegiate Dictionary at 984 (1990) (emphasis added). A diarist records events, observations, feelings, or thoughts after they happen. Thus, a diary is retrospective, not prospective. A diary is not a place to jot down the date and time of a distant dentist appointment, regardless of whether that appointment would constitute an "event of importance."

Applying the above principles, the articles at issue fall into the category of articles similar to diaries (encompassed by "other" in subheading 4820.10.40) rather than as diaries under subheading 4820.10.20. As an initial matter, neither the trial court decision nor the government's brief identifies which part of the day planners they consider the diary portion. This court assumes that the court below focused on the "daily planner" section, which all five-day planner models have in common.[2] The daily planner section includes a series of pages allocated to days and numbered with the hours of the day along the left hand side of the page. Two blank lines (four shorter lines in the largest model) extend to the right of each hour. Suffice it to say that the space provided by these blank lines would not permit a diarist to record relatively extensive notations about events, observations, feelings, or thoughts. This limited space permits instead only the briefest notations. Space for only a word or phrase disqualifies these articles as diaries.

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[2] To the extent the government relies on any other portion of the day planners not discussed herein, this court has considered all sections and has determined that none qualify the article as a diary.

Moreover, an examination of the articles themselves reveals that the space provided was not intended for recording past events. The top of each page carries the caption "Daily Planner" and the word "Appointments" appears above the blank lines. These pages facilitate advance planning and scheduling. As noted above, however, a diary is not for planning. Instead, a diary receives a retrospective record of events, observations, thoughts, or feelings about them. Mead markets its entire article as a "Day *Planner*," further buttressing the distinction between this prospective scheduling article and a diary. While the importer's marketing of the goods will not dictate the classification, such evidence is relevant to the determination and, in this case, weighs against classifying the articles as diaries. Indeed, the earlier trade cases—*Baumgarten* (desk-diaries); *Brooks Brothers* (Economist Diary); *Charles Scribner's Sons* (Engagement Calendar)—turned at least in part on the fact that the importers themselves regarded their articles either as diaries or as calendars. *See, e.g., Brooks Brothers*, 68 Cust. Ct. at 98 ("[T]he Economist Diary is . . . by its own description a 'diary'").

B. Bound

Reasoning that the tariff provisions at issue cover a "wide variety of book and non-book articles," the trial court eschewed the meaning of "bound" as used in the trade of book manufacturing in favor of the purported common meaning of the term. While true that heading 4820 covers book and non-book articles, the term "bound" does not appear in that heading. Rather, the term appears for the first time in subheading 4820.10.20 where it modifies "Diaries, notebooks and address

books." These three items, the parties agree, are all books. Thus, the trial court's premise that the provision at issue covers non-book articles falls, as does its conclusion. Because the subheading uses the term bound in connection with types of books, this court looks to the common meaning of that term in that context.

The Dictionary of Publishing, at 43-44 (1982), defines the term "bound book" as: "Books that have been cased in, usually referring to books that have been sewn, glued, or stapled into permanent bindings." *Webster's Ninth New Collegiate Dictionary* defines "bound" as "4. *of a book*: secured to the covers by cords, tapes, or glue." All of the binding methods described in these definitions are permanent bindings. Thus, this court concludes that the term "bound," when used with reference to books as in subheading 4820.10.20, means permanently secured or fastened. In addition, affidavits from bookbinding and stationery goods experts in the record confirmed this meaning of the term "bound" in its proper context.

The Court of International Trade's definition of "bound," in contrast, essentially renders that limitation superfluous. A "bound diary" contemplates the existence of an "unbound diary." But if "bound" means fastened regardless of the permanency, what is an "unbound diary"? At oral argument, the government argued that a stack of loose-leaf pages could constitute an unbound diary. While such a stack would certainly be unbound, this court seriously questions whether it would qualify as a diary. The definition adopted in this opinion, however, leaves some meaning to the class of goods known as unbound diaries, namely, those not

permanently fastened. The day planners at issue, contained in ringed loose-leaf binders, fall squarely within that class of goods.

IV.

For the independent reasons that the subject articles are neither "diaries" nor "bound," this court reverses the trial court's classification of the goods. The goods are properly classified under the "other" subheading of 4820.10.40.

COSTS

Each party shall bear its own costs.

REVERSED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ORDER

A petition for rehearing en banc having been filed by the APPELLEE, and a response thereto having been invited by the court and filed by the APPELLANT, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on November 8, 1999.

FOR THE COURT,

/s/ JAN HORBALY (AV)
JAN HORBALY
Clerk

Dated: November 1, 1999

cc: Sidney H. Kuflik
Amy M. Rubin

Terence P. Stewart

MEAD CORP V US, 98-1569
(CIT - 95-12-01783)

APPENDIX C

UNITED STATES COURT OF
INTERNATIONAL TRADE

Slip. Op. 98-101
Court No. 95-12-01783

THE MEAD CORPORATION, PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

July 14, 1998

OPINION AND ORDER

WATSON, Senior Judge.

This action involves the tariff classification of imported loose-leaf books containing calendars, room for daily notes, telephone numbers, addresses and notepads. This sort of product originated in England and is probably best known under the trademark of Filofax.[1]

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[1] Filofax, Inc., importer and U.S. distributor of the "Filofax" line of products, has filed an amicus curiae brief. It did so primarily to make the point, hereby acknowledged, that "Filofax" is a registered trademark, properly used only in connection with Filofax products. It is not a generic term for the type of products involved in this case. As for the classification issues involved herein, Filofax is pursuing its own actions with respect to the classification of its products.

The importations were classified as bound diaries under Subheading 4820.10.20 of the Harmonized Tariff Schedules of the United States ("HTSUS"). That provision, in context, reads as follows:

> 4820 Registers, account books, notebooks, order books, receipt books, letter pads, memorandum pads, diaries and similar articles, exercise books, blotting pads, binders (looseleaf or other), folders, file covers, manifold business forms, interleaved carbon sets and other articles of stationery, of paper or paperboard; albums for samples or for collections and book covers (including cover boards and book jackets) of paper or paperboard:
>
> 4820.10 Registers, account books, notebooks, order books, receipt books, letter pads, memorandum pads, diaries and similar articles:
>
> CLASSIFIED:
>
> 4820.10.20 Diaries, notebooks and address books, bound; memorandum pads, letter pads and similar articles 3.2%
>
> CLAIMED:
>
> 4820.10.40 Other ..... Free

Mead has moved for partial summary judgment with respect to two causes of action, first, that the importations are not "diaries" and, second, that the importations are not "bound." A third cause of action, relating to two of the imported styles, in which the loose-leaf binder is not riveted to the jacket cover, are

not included in plaintiff's motion. The government's crossmotion covers the entire action and seeks summary judgment that all the importations are bound diaries as a matter of law and were properly classified as such. The parties agree that the resolution of this action depends on the determination of the meaning of the words "diary" and "bound" as used in the relevant subheading.

Plaintiff's first argument is that the importations are not diaries within the meaning of Subheading 4820.10.20. The Court notes that, if this is so, they would not be classifiable as similar to diaries under that subheading even though the subheading ends with the phrase "and similar articles." This is so because, unlike Subheading 4820.10, the phrase "and similar articles" in Subheading 4820.10.20 does not refer back to diaries. The semicolon in that subheading breaks it into separate units and only memorandum pads and notepads are the subjects of the final phrase "and similar articles." In other words, if the importations are similar to diaries, but not actually diaries, they would not fit into subheading 4820.10.20 and plaintiff's claim would be correct.

Both parties argue that their position is supported by prior case law. However, in the opinion of the Court, the case law supports the position of the government on the first issue. In other words, the importations are within the tariff understanding of the term "diaries."

In *Fred Baumgarten v. United States*, 49 Cust. Ct. 275, Abstract No. 67150 (1962), the importation was described as follows:

The imported article, as represented by plaintiff's exhibit 1, is a plastic-covered book, approximately 4 1/4 by 7 3/8 inches in dimensions. Its first few pages contain, successively, the date "1961," the notation "Personal Memoranda," calendars for the years 1960, 1961, and 1962, and a few statistical tables. The following 20-odd pages contain spaces for addresses and telephone numbers, each page more or less set aside for each letter of the alphabet. The remaining portion of the book consists of ruled pages allocated to the days of the year and the hours of the day and each headed with calendars for the current and following months. A blank-lined page, inserted at the end of each month's section, is captioned "Notes."

The court held that the distinguishing feature of a diary was "its suitability for the receipt of daily notations" and found that "[b]y virtue of the allocation of spaces for hourly entries during the course of each day of the year, the books are designed for that very purpose." It should be noted that the presence of pages for addresses and telephone numbers did not affect the court's conclusion in that case.

In *Brooks Bros. v. United States*, 68 Cust. Ct. 91, C.D. 4342 (1972) the court had before it an importation called the Economist Diary, a spiral bound book offered and sold as a diary with "more blank pages, used for recording events and appointments, than there are pages containing information." The court found that the diary portion was the essential or indispensable part of the importation and was therefore controlling of its classification.

In *Charles Scribner's Sons v. United States*, 6 CIT 168, 574 F. Supp. 1058 (1983) the court overturned the classification of a product as a diary under Item 256.56 of the Tariff Schedules of the United States ("TSUS") in favor of classification as a calendar under Item 274.10. The article in question consisted of a book described as an engagement calendar for the year 1979. The book consisted of photographs, each photograph occupying one page and facing another page on which a calendar was devoted to the seven days of a week. The book covered fifty-three weeks in all. The court found that the space allocated to daily notation was "minuscule, measuring approximately one-inch by 4 13/16 inches, and was intended for a notation of no more than a sentence or two." The court further found that the essential purpose of the book was to "convey high-quality Sierra Club photography in the form of a calendar."

The common thread in these cases is the understanding that "diaries" are articles whose principle purpose is to allow a person to make daily notations concerning events of importance. Articles may be diaries even if they contain supplementary material of a different type, such as useful printed information or addresses and telephone numbers. It can therefore be fairly concluded that tariff language adopted with knowledge of these judicial precedents maintains the understanding inherent in those decisions. *Central Products Co. v. United States*, 20 CIT 862, 936 F. Supp. 1002, 1006-7 (1996).

Plaintiff also argues that the diary provision in the HTSUS differs from prior tariff provisions sufficiently to make cases decided under earlier tariff laws inappli-

cable. Plaintiff points to the fact that the term "diary" in Item 256.56 of the TSUS was an eo nomine provision including all forms of a diary. Under the HTSUS, contends plaintiff, articles "similar" to a diary are "other" than diaries and have a separate provision in Subheading 4820.10.40.

This line of reasoning implies that articles with special features other than those purely dedicated to daily notation may be similar to diaries, but not actually diaries. This argument would be persuasive if it appeared that the provision for "other" articles similar to diaries would be empty or meaningless unless articles such as these came within its ambit. But the government points out that there exists a category of merchandise more remote from "pure" diaries than the importations but still sufficiently close to be called "similar." Thus, in HQ 955199 of January 24, 1994 (defendant's Exhibit P) the Customs Service issued binding classification rulings that a small diary-like book entitled "Special Occasion Book," devoted to making notes for "recording the name, date, occasion and gift idea for special dates" and a book called "Car Care Planner" devoted to the entry of information related to the maintenance of a car were similar to diaries and therefor came within the scope of "other" articles under Subheading 4820.10.40. They were not actually diaries, reasoned the ruling, because their usefulness was limited to special situations.

The rationale used in that ruling is persuasive and provides reassurance that the residual provision for "other" articles in Subheading 4820.10.40 need not be read as covering these importations out of concern that otherwise the subheading would cover nothing at all.

As is often the case, the exhibits are potent evidence. Examination of them leads the Court to conclude that the importations are forms of diaries rather than articles similar to diaries. Their use for notational purposes is not confined to a limited phase of human life or to a narrow area of activity. They are designed for notations concerning the full range of daily experience. As such, they fall within the meaning of the term "diaries" notwithstanding the fact that they contain supplementary material.

In the second stage of this dispute, the success of plaintiff's claim depends on whether or not the diaries are "bound" within the meaning of the subheading in which they were classified.

On this question the plaintiff argues that the meaning of "bound" ought to be derived from the permanent form of attachment demanded of books in *Overton & Co. v. United States*, 22 Treas. Dec. 437, T.D. 3237 (1912). That was a decision of the Board of General Appraisers in which General Appraiser Israel F. Fischer (later to be Chief Justice of the United States Customs Court in its first years) held that permanent binding was the distinction between a book and a booklet. In that decision it was held that small books for such purposes as the recording of weddings or the progress of a baby's growth were books under paragraph 416 of the Tariff Act of 1909 rather than booklets under paragraph 412 because they were "firmly and permanently stitched and bound small books, such as are the product of the bookbinders art."

In that case "booklets" were understood to be "an article used for greeting or souvenir purposes, sold and

dealt in by art dealers and stationers, and made up of several leaves or inserts flimsily fastened within a folder of paper or other material."

The Court is mindful of the salutary principle that a continuity of meaning should be maintained from one tariff act to another if Congress has not indicated otherwise. *Hemscheidt Corp. v. United States*, 72 F.3d 868 (Fed. Cir. 1995). However, it cannot be said that the *Overton* decision spoke to the general meaning of the term "bound" as it might be used in a statute. It simply decided that the distinction between a book and booklet lay in the relative permanence of the binding. This is not the sort of judicial decision that fixes statutory terminology so as to allow the court to reason that the legislators must have later used "bound" in the sense of articles that are irremovably joined to one another.

Nor can it be said that the later use of the term "bound" in the Tariff Schedules of the United States or the present HTSUS was so specifically linked to the field of book manufacture that specialized dictionary definitions of the term or bookbinding expertise ought to apply. The tariff provisions here under consideration cover a wide variety of book and non-book articles. Even those that are in book form are not the traditional books of the bookbinding trade. It follows that in these circumstances, the term "bound" should be given its common meaning rather than one associated with the trade of book manufacture. The common meaning of "bound" is fastened. The irrevocability of the fastening is not important so long as it goes beyond the transitory role of packaging.

For the reasons given above, it is the opinion of the Court that the importations at issue are bound diaries within the meaning of Subheading 4820.10.20 of the HTSUS. Consequently, defendant's motion for summary judgment will be granted.

ORDER

This matter is before the court on plaintiff's partial motion for summary judgment, and defendant's cross-motion for summary judgment regarding the tariff classification of imported loose-leaf books.

It is hereby ORDERED that defendant's cross-motion for summary judgment is granted and the action is hereby dismissed.

APPENDIX D

UNITED STATES CUSTOMS SERVICE
DEPARTMENT OF THE TREASURY

RE: Decision on Application for Further Review of Protest No. 4501-93-100016; classification of engagement book; organizer; day/week planner; agenda; dairy; not "similar to" a diary; 4820.10.2010, HTSUSA; Fred Baumgarten v. United States, 49 Cust. Ct. 275, Abs. 67150 (1962); Brooks Bros. v. United States, 68 Cust. Ct. 91, C.D. 4342 (1972); Charles Scribner's Sons v. United States, 574 F. Supp. 1058; 6 C.I.T. 168 (1983). HRL's 089960 (2/10/92); 952691 (1/11/93); 953172 (3/19/93); 953413 (3/29/93); 955253 (11/10/93); 955199 (1/24/94); 955636 (4/6/94); 955637 (4/6/94); 955516 (4/8/94).

CLA-2 CO:R:C:T 955937
October 21, 1994

CATEGORY: Classification
TARIFF NO.: 4820.10.2010

District Director
U.S. Customs Service
4477 Woodson Road, Rm. 200
St Louis, MO 63134-3716

Dear Sir:

This is a decision on application for further review of a protest timely filed on March 26, 1993, by Sidney H. Kuflik of the law firm of Lamb & Lerch, on behalf of his

client, the Mead Corporation, against your decision regarding the classification of day/week planners, also referred to as organizers or agendas. Four entries of the subject merchandise were made at the port at Kansas City, Missouri, between the dates of September 3 and October 14, 1992. These entries were liquidated between December 28, 1992, and January 29, 1993.

Counsel for the importer raises two issues in his application for further review of protest number 4501-93-100016. Counsel contends that there has been a detrimental reliance by Mead on the duty-free classification of its day planners under subheading 4820.10.4000, HTSUSA. Reliance was based upon a series of three 1991 New York Ruling Letters (NYRL's). On August 18, 1993, this office issued Headquarters Ruling Letter (HRL) 953690, dealing with Mead's detrimental reliance claim. Counsel also raises substantive legal arguments pertaining to the validity of the classification of these articles under subheading 4820.10.2010, HTSUSA.

Since detrimental reliance is not a matter subject to protest, we will deal with the classification issues in this document and will respond directly to the District Director as to how HRL 953690 impacts the four entries currently at issue.

A supplemental submission relating to the classification of this merchandise was sent to this office by Mr. Kuflik on September 22, 1994.

FACTS:

The articles at issue are described as "day planners." The style numbers the subject of this protest are 47062, 47064, 47066, 47068, 47102, 47103, 47104, 47105, 47106, 47107, 47122, 47124, 47126, 47128, 47130, 47132, 47134, 47136, 47138, 47140, 47142, 47144, 47172, 47174, 47176, 47178 and 47180. Samples of style numbers 47062 and 47104 were submitted to this office along with generalized information about the day planners. Some of the day planners contain three-ring binders which are inserted into a pocket on the inside of the jacket cover. These articles contain calendar planners, daily planners, sections designated for address/telephone information, blank note pads, rulers, plastic business card holders and graph note pads.

Four entries of the subject merchandise were liquidated by Customs under subheading 4820.10.2010, HTSUSA, as bound diaries, dutiable at a rate of 4 percent ad valorem.

Protestant contends that the day planners are properly classifiable under subheading 4820.10.4000, HTSUSA, and entitled to duty free entry. In support of this contention, protestant states:

1) the day planners at issue are not diaries per se, but rather articles "similar to" diaries, and therefore classification is precluded from subheading 4820.10.20, HTSUSA; and

2) even if these articles are deemed to be diaries, they are not "bound" diaries and therefore classification is precluded from subheading 4820.10.20, HTSUSA.

ISSUES:

Whether the day planners are classifiable as diaries of subheading 4820.10.20, HTSUSA, or as articles similar to diaries under subheading 4820.10.40, HTSUSA? Whether the articles at issue are considered bound?

LAW AND ANALYSIS:

Classification of merchandise under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes, taken in order. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI's.

I. ARE THE DAY PLANNERS CLASSIFIABLE AS "DIARIES" OR AS ARTICLES "SIMILAR TO" DIARIES?

The determinative issue is whether the subject merchandise is classifiable as bound "diaries" under subheading 4820.10.2010, HTSUSA, or as "similar to" diaries under subheading 4820.10.4000, HTSUSA. This issue has been addressed in several rulings by this office. See HRL's 089960 (2/10/92); 952691 (1/11/93); 953172 (3/19/93); 953413 (3/29/93); 955253 (11/10/93); 955199 (1/24/94); 955636 (4/6/94); 955637 (4/6/94); and 955516 (4/8/94). In these rulings this office has consistently determined that articles similar in design and/or function to the instant merchandise are classifiable as diaries. The rationale for this determination

was based on lexicographic sources, as well as extrinsic evidence of how these types of articles are treated in the trade and commerce of the United States.

In counsel's original memorandum of law in support of the Mead Corporations' protest, dated May 21, 1993, it is contended that "Customs Headquarters has at no time even remotely suggested that day planners are diaries per se." We disagree. In HRL 089960, this office unequivocally stated that "subheading 4820.10.2010, HTSUSA, provides for bound diaries and address books." The holding in that ruling determined the leather agenda then at issue to be classifiable under subheading 4820.10.2010, HTSUSA. In HRL 952691, issued to the Mead Corporation, Customs held that when the "Personal Day Planner" then at issue was examined "in light of Heading 4820, HTSUSA, the common dictionary definition of 'diary', and past Customs rulings, it appears that the item is classifiable as a bound diary . . . ." In HRL 953172, this office determined that the day planners then at issue "fall squarely within the dictionary definition of diary . . . ." This sentiment was also expressed in HRL 953413. We note that all these rulings were issued before the date of counsel's original submission of legal arguments to Customs.

In all of the rulings cited supra, Customs held that articles synonymously referred to as diaries, planners, agendas, organizers and engagement books, most of which incorporated the same or similar components as the subject merchandise (i.e., day/week planners, address/telephone sections, blank sections for notes), fit squarely within the definition of "diary" as set forth in

the Compact Edition of the Oxford English Dictionary, 1987. That definition reads:

> 2. A book prepared for keeping a daily record, or having spaces with printed dates for daily memoranda and jottings; also applied to calendars containing daily memoranda on matters of importance to people generally or to members of a particular profession, occupation, or pursuit.

In counsel's supplementary submission to this office, dated September 22, 1994, it is argued that Customs should base its classification of the subject merchandise solely on the first definition of "diary" presented in the Oxford English Dictionary, which reads:

> 1. A daily record of events or transactions, a journal, specially, a daily record of matters affecting the writer personally, or which come under his personal observation.

In response to this claim, we wish to stress two points. First, Customs is not obligated to limit its reliance on lexicographic sources to the first definition presented for a given word. Reference to lexicographic sources is a means to ascertain the commonly accepted definition or definitions, for a word or term. It broadens our understanding of a word so as to arrive at a more accurate classification. Many words have several definitions and Customs may consider any or all of them when making a classification determination. Second, we note that the narrower definition of "diary," as set forth in the Oxford English Dictionary's first definition, connotes an article containing blank pages used to record extensive notations of one's daily activities. This is not the sole format for a diary. The word

"diary" also connotes a more formal and comprehensive approach to record-keeping.

The broader concept of diary includes those articles classified in HRL's 955636 and 955637, both dated April 6, 1994. In those rulings Customs determined that the classification of day planners as diaries reflects the common and commercial identity of these items in the marketplace. In HRL 955636, Customs classified day planners that were similar in function to the articles currently at issue. The covers of the day planners classified in HRL 955636 were conspicuously and indelibly printed with the legend "1994 Desk Diary." As we noted in that ruling, it stands to reason that the publisher would not have gone to the added expense of printing "1994 Desk Diary" on these articles' covers, nor risked alienating potential customers, if the articles were not indeed recognized as diaries in the marketplace. The fact remains that these articles must be considered a recognized form of diary if a manufacturer in the industry labels the articles as such and purposely presents them in such a manner to the consumer. This fact is pertinent in the instant analysis because the articles marketed as diaries in HRL 955636 and the Mead planners at issue are similar in material respects; both articles contain day and week planners with spaces to record appointments and various notations, sections for address and telephone numbers and blank sections for notes. As the overall design and function of the HRL 955636 diaries and the Mead planners are the same, and the former are marketed to consumers as diaries and recognized in the trade as such, it is reasonable to conclude that the Mead planners are similarly deemed to be diaries in the trade and commerce of the United States.

Further evidence that day planners are treated as a form of diary in the trade and commerce of the United States is provided by current advertisements run in The New Yorker magazine. The New Yorker regularly displays full-page advertisements for its "1994 New Yorker Desk Diary." The diary depicted in the advertisement appears to have a similar function to the planners under review. The advertisement's copy reads: "Since you depend on a diary every day of the year, pick the one that's perfect for you . . . Recognize what's important to you: a week at a glance, a ribbon marker, lie flat binding (spiral), lots of space to write."

In counsel's supplementary submission it is argued that the "1994 New Yorker Desk Diary" differs from the Mead planners at issue. Counsel contends that the New Yorker Desk Diary warrants classification as a diary in that its address book and note pad section are "relatively minor and incidental elements," and that these components comprise less than 10 percent of the diary's volume. Counsel submits that the Mead planner is different in that it is not marketed specifically as a diary, the address book and note pad components are refillable, the "non-diary" components cost more than the diary features, and "the day planner's essential character is no longer exclusively derived from its diary function."

We address counsel's arguments in the order set forth above. First, an examination of the New Yorker Diary reveals that it contains far more extraneous information and components than merely an address book and note book, yet it still primarily functions as a diary. As is discussed later in this ruling, this is the standard that the Court of International Trade used to determine

whether an article was classifiable as a dairy. Second, the fact that the New Yorker Diary is labeled and marketed as a diary is persuasive evidence of the article's identity; however, the mere fact that an article is not specifically labeled a diary does not preclude it from classification as such. Third, we see no relevance in the fact that the components in the Mead planners are refillable. Counsel argues that the ability to replace components is "strong indicia that the features are not merely complementary to the diary portion of the day planner . . . ." We do not agree. The fact that certain components are refillable may indicate only that the outer cover of the diary is expensive and durable enough so as to warrant use for several years, thereby necessitating refillable paper inserts. Lastly, the fact that the extraneous components in the Mead planners cost more than the pages to be used for written notations is irrelevant. The relative cost of components is not pertinent to classification in situations where we have a court-imposed standard which requires that a dairy's distinguishing feature be its suitability for the receipt of daily notations. See Fred Baumgarten v. United States, 49 Cust. Ct. 275, Abs. 67150 (1962). Paper inserts will invariably be the least expensive components of a diary. In many instances, the cost of the outer cover will be the most expensive component, and yet the article will be classified as a diary, and not as a binder, so long as it primarily functions as a site for the daily recordation of notes and appointments.

The Court of International Trade has spoken to the issue of what constitutes a diary for classification purposes. In Fred Baumgarten v. United States, the court dealt with the classification of a plastic-covered book which was similar in overall function to the articles

currently under review. In Baumgarten, the court determined the correct classification of an article which measured approximately 4-1/4 inches by 7-3/8 inches and contained pages for "Personal Memoranda," calendars for the years 1960-1962, statistical tables, and 20-odd pages set aside for telephone numbers and addresses. The majority of the book consisted of ruled pages allocated to the days of the year and the hours of the day. A blank lined page, inserted at the end of each month's section, was captioned "Notes." The court held that this article was properly classified by Customs under item 256.56, Tariff Schedules of the United States, which provided for "Blank books, bound: diaries," at a duty rate of 20 percent ad valorem. In that ruling, the court held: "the particular distinguishing feature of a diary is its suitability for the receipt of daily notations; and in this respect, the books here in issue are well described. By virtue of the allocation of spaces for hourly entries during the course of each day of the year, the books are designed for that very purpose. That the daily events to be chronicled may also include scheduled appointments would not detract from their general character as appropriate volumes for the recording of daily memoranda." emphasis added

The Baumgarten Court's analysis and holding, if applied to the merchandise at issue, yields a similar finding: the articles at issue are properly classifiable as bound diaries of subheading 4820.10.2010, HTSUSA, inasmuch as their distinguishing feature is their suitability for the receipt of daily notations. As with the articles at issue in Baumgarten, the Mead day planners contain allocated spaces for daily and hourly entries. Moreover, these diaries contain even more available writing space than did the articles deemed to

be diaries in Baumgarten, arguably rendering the subject merchandise even more suitable for "the receipt of daily notations."

As stated supra, the court in Baumgarten determined that the distinguishing feature of a diary is its suitability for the receipt of daily notations. The merchandise at issue, as is the case with most articles described as planners, organizers, agendas, engagement books, etc., contains information pages or interior components such as card holders, rulers and the like, which do not directly relate to the function of receiving written notations. The issue of whether the presence of extraneous material (i.e., weights and measure charts, conversion charts, "Year-at-a-Glance" calendars, maps, telephone area codes, rulers, card holders, etc. . . .) precludes classification as a diary was discussed in Brooks Bros. v. United States, 68 Cust. Ct. 91, C.D. 4342 (1972). In that case, the court dealt with the proper classification of an article described as "The Economist Diary." The plaintiff in Brooks Bros. argued that although "The Economist Diary" was in part a diary, it contained many pages useful solely for the information presented and therefore was not classifiable as a bound diary, but rather as a book consisting of printed matter or, in the alternative, a bound blank book. The court noted: Notwithstanding plaintiff's efforts to demonstrate that the Economist Diary is not a diary but a 'book of facts,' an examination of the diary reveals that there are more blank pages, used for recording events and appointments, than there are pages containing information . . . . The article is a diary which contains certain informational material in order to render it more useful to the particular class of buyers it seeks to attract. It is to be noted that the

exhibits introduced at the trial, that are conceded to be 'diaries,' also contain 'informational material,' . . . This additional material admittedly does not change their essential character as 'diaries." emphasis added

The Brooks Bros. Court concluded that "The Economist Diary" was properly classified by Customs as a diary and that this conclusion was "strengthened by the fundamental principle of customs law that an eo nomine designation of an article without limitation includes all forms of that article." As subheading 4820.10.2010, HTSUSA, eo nomine provides for bound diaries, and the articles at issue fit the Oxford English Dictionary's definition of diary, and are similar in function to the articles the courts in Baumgarten and Brooks Bros. found to be bound diaries, this office is of the opinion that the subject merchandise is properly classifiable as bound diaries under this subheading.

We think it imperative to recognize that there are many forms of "diaries." They may have outer covers of plastic, leather, paper or textile material. They may contain an array of components such as rulers, business card holders, pens, pencils, calculators and assorted inserts that are used either for providing information or as a means of recording specific types of information (i.e., sections for fax numbers, car maintenance information, personal finance data, etc. . . .). As the court in Brooks Bros. noted, citing Hancock Gross, Inc. v. United States, 64 Cust. Ct. 97, C.D. 3965 (1970), "The primary design and function of an article controls its classification." Hence, the determinative criteria as to whether these types of articles are deemed "diaries" for classification purposes is whether they are primarily

designed for use as, or primarily function as, articles for the receipt of daily notations, events and appointments.

In counsel's supplementary submission to this office, it is argued that in light of a recent court decision, Nestle Refrigerated Food Company v. United States, Slip. Op. 94-118 (CIT, July 20, 1994), Customs should rethink its approach to the classification of diaries which contain extraneous components unrelated to the recordation of daily notes and appointments. In Nestle, the court dealt with the issue of whether a canned tomato product containing other ingredients was classifiable as "tomatoes, whole or in the piece," as "preparation for sauce," or as "tomato sauce." Counsel submits that the analysis required of the court in Nestle closely mirrors the situation in the instant case in that we must determine whether the subject articles, by virtue of their added extraneous elements, cease to be diaries and have become articles "similar to" diaries. Specifically, counsel argues that the presence of the zipper pouch, ruler, business card holder, address book and note pad serve to remove the Mead planners from the realm of "diary" and render them "similar to" diaries. Counsel states that these features are not "complementary to the diary definitional base" and "alter the essence of the article so that the day planners' essential character is no longer exclusively derived from its diary function."

There are several problems with this analogy. First, the court in Nestle merely acknowledged that optional ingredients "must serve to complement, highlight, and not overwhelm, the essential character of the tomatoes." The court further noted that, "When too much of an optional ingredient or a combination of optional

ingredients are added to tomatoes . . . the tomato component is materially altered" and "the product can no longer be deemed to be just tomatoes." The Nestle Court focused on an article's "essence." The Brooks Bros. Court found an article's "primary design and function" to be determinative of classification. These analyses are similar in the sense that if an article is primarily designed as, and functions as, a diary, it stands to reason that it will be the diary component which imparts the article's "essence."

This office is of the opinion that the Brooks Bros. Court has explicitely set forth the standard we are to apply when dealing with diaries containing extraneous components. In that case the court recognized: "The fact that the Economist Diary contained a significant quantity of printed material did not change its essential character . . . Regardless of the incidental value or utility of its informational material, it was still primarily and essentially a diary . . . the informational material contained in the Economist Diary merely rendered it more useful and attractive to a particular class of purchasers . . . Without the diary portion, it could not be sold as a diary of any kind." emphasis added

We disagree with counsel's position that, pursuant to the analysis set forth in Nestle, a diary's essence must be imparted "exclusively" from its diary components to warrant classification in subheading 4820.10.2010, HTSUSA. Rather, we believe it is the Brooks Bros. analysis which is applicable in this instance: regardless of the presence of extraneous components, so long as the article is primarily a place for the recordation of events and appointments, it is

classifiable as a diary. It is this office's opinion that the Mead planners at issue have been primarily designed to perform a diary function.

Lastly, we note that the decision rendered in Charles Scribner's Sons, Inc. v. United States, 574 F. Supp. 1058; C.I.T. 168 (1983), is not precedential in the instant case in that the article at issue in that case is significantly different than the articles currently the subject of this protest. At issue in Scribner's was whether an article described as the "Engagement Calendar 1979" was a calendar or a diary for classification purposes under the TSUSA. The article under consideration in that case was described as a spiral-bound desk calendar with high-quality Sierra Club photographs featured on the left side of the opened calendar, and a table of days of the week on the right side. The article measured approximately 9-3/8 inches by 6-1/2 inches and the space allotted for each day of the week measured approximately one inch by 4-13/16 inches. The article was made of titanium-coated paper which was specifically chosen because it was best-suited for photographic reproduction. Plaintiff's witness in that case testified that although Charles Scribner's Sons, Inc. had received numerous complaints that the paper was not well-suited for writing, the plaintiff chose not to change the paper because the primary objective was to accentuate the photographs. Another witness for the plaintiff testified that the desk calendar had been marketed throughout the country as a calendar "because it was not suitable as a diary." The suitability determination, or lack thereof, was based on the quality of paper used (as stated, it was not appropriate paper for the receipt of written notations) and the quantity of writing space available. All of the factors which

precluded the article in Scribner's from classification as a diary are absent in the instant case. The type of paper used in these articles is well-suited for writing and the amount of space allocated for the recordation of notes, events and appointments is presumably adequate inasmuch as it is at least as great as that provided for in the articles held to be diaries in both Baumgarten and Brooks Bros..

The court in Scribner's stated that as the courts in Baumgarten and Brooks Bros. did not "distinguish between a diary and a calendar . . . they do not govern the result in the present case." Similarly, this office is of the opinion that as the issue in Scribner's was whether an article was a calendar or a diary, and the issue in the present case is whether the articles are diaries or "similar to" diaries, Scribner's is not precedential in this instance. The courts' decisions in Baumgarten and Brcoks Bros. are pertinent to our determination because those cases focused on the specific issue of what constitutes a diary for tariff classification purposes. Moreover, the articles determined to be diaries in those two cases bear a strong resemblance in both form and function to the merchandise currently under review.

Based on the Mead planners' suitability for the receipt of daily notations, lexicographic sources, treatment of planners in the trade and commerce of the United States, and prior treatment of similar articles by the Court of International Trade, the subject planners are deemed to be "diaries" for tariff classifica tion purposes, and classifiable under subheading 4820.10.2010, HTSUSA.

II. ARE THE ARTICLES AT ISSUE "BOUND" FOR PURPOSES OF CLASSIFICATION UNDER 4820.10.2010, HTSUSA?

The second issue before us is whether the day planners at issue are considered "bound" for purposes of classification within subheading 4820.10.2010, HTSUSA. In counsel's supplementary submission to this office, the argument is made that the Mead planners at issue are not "bound" for purposes of classification under subheading 4820.10.2010, HTSUSA, inasmuch as they do not meet the definition of a "bound book" as set forth in Kessler & Co. v. United States, 63 Cust. Ct. 513, C.D. 3944 (1969), citing Overton & Co. v. United States, 22 Treas. Dec. 437, T.D. 32327 (1912).

In Overton, the court defined a bound book as a "collection of leaves of any size permanently stitched or bound together in a cover, the binding being of the kind of work performed by the bookbinder." Counsel submits numerous other lexicographic definitions from both general and trade dictionaries which provide similar definitions of "bookbinding," and thereby arrives at the conclusion that the Mead planners at issue are not bound in the sense contemplated by the bookbinding trade. We note that all the submitted definitions set forth what constitutes a bound book. The issue at hand, however, is whether diaries with metal looseleaf binders, or spiral binders, are considered bound diaries for tariff classification purposes. The issue is not what constitutes a bound book, and there is no requirement that a diary be in the format of a book.

The Harmonized Commodity Description and Coding System Explanatory Notes (EN) to heading 4820, page 687, which represent the official interpretation of the HTS at the international level, state: "goods of this heading may be bound with materials other than paper (e.g., leather, plastics or textile material) and have reinforcements or fittings of metal, plastics, etc."

It is clear that the Harmonized System Committee contemplated metal binders as being within this heading's definition of bound articles.

Counsel contends that as the term "bound" is found for the first time at the eight digit level (it modifies the term "diary" in subheading 4820.10.20, HTSUSA), and the EN represent the official interpretation of the HTS only at the four and six digit level, the EN provide no instruction as to the meaning of the word "bound." While we concur that the EN need not be applied at the eight digit level, we disagree that the EN are of "no value" in this instance. The value of the EN is that they provide guidance and insight into the intent of the Harmonized System Committee when drafting the Nomenclature. In this case, the EN specifically set forth how articles of heading 4820, HTSUSA, may be bound. The EN state that articles of this heading may be bound with metal. This office interprets this language as indicative of the drafters' intent to include as bound any articles possessing ring binders or spiral binders. This position is in accordance with the courts holding in Brooks Bros., in which an article constructed with a spiral binding was classified as a bound dairy under item 256.56, Tariff Schedules of the United States Annotated (TSUSA).

We further note that the manner in which items 256.56 and 256.58 were drafted under the TSUSA supports our position that the term "bound" was intended to include ring binders and spiral binders. Items 256.56 and 256.58 TSUSA, provide for:

Blank books, bound:

256.56 Diaries, notebooks and address books: 4%

256.58 Other: .....Free

If this office were to adopt counsel's contention, that only books bound in the traditional bookbinding method (i.e., with stitching and glue) were to be deemed "bound," there would be no place in item 256, TSUSA, for diaries bound with ring binders and spiral binders as both the "diary" breakout and the "other" breakout are modified by the term "bound." This situation differs from the current construction of the HTSUSA, where subheading 4820.10.20 provides for bound diaries and 4820.10.40 is the provision where unbound diaries would be classified.

Lastly, we note that a semantical approach to this issue is revealing: a binder, whether a ring binder or spiral, is that which binds pages together in a fixed order. Pages held together in this manner are bound, and the diary is therefore deemed a bound article.

HOLDING:

The Mead Corporation day planners, referenced style numbers 47062, 47064, 47066, 47068, 47102, 47103, 47104, 47105, 47106, 47107, 47122, 47124, 47126, 47128,

47130, 47132, 47134, 47136, 47138, 47140, 47142, 47144, 47172, 47174, 47176, 47178 and 47180, are classifiable under subheading 4820.10.2010, HTSUSA, which provides for, inter alia, bound diaries and address books, dutiable at a rate of 4 percent ad valorem.

Since the classification indicated above is the same as the classification under which the subject entries were liquidated, you are instructed to deny the protest in full.

A copy of this decision should be attached to the Form 19 and provided to the protestant as part of the notice of action on the protest. In accordance with Section 3A(11)(b) of Customs Directive 099 3550-065, dated August 4, 1993, Subject: Revised Protest Directive, this decision should be mailed by your office to the protestant no later than 60 days from the date of this letter. Any reliquidation of the entry in accordance with this decision must be accomplished prior to the mailing of the decision.

Sixty days from the date of this decision, the Office of Regulations and Rulings will take steps to make the decision available to Customs personnel via the Customs Rulings Module in ACS and to the public via the Diskette Subscription Service, Freedom of Information Act and other public access channels.

Sincerely,

John Durant, Director
Commercial Rulings

Supreme Court, U.S.
FILED
APR 26 2000
CLERK

No. 99-1434

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

THE MEAD CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

The Mead Corporation has no parent company and there is no publicly held company which owns 10% or more of The Mead Corporation's stock.

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STATUTORY AND REGULATORY PROVISIONS INVOLVED

In addition to the provisions set out by Petitioner, the following statutory and regulatory provisions are pertinent to the Court's consideration of the Petition for a Writ of Certiorari ("Petition" or "Pet. Cert.").

1. 19 C.F.R. § 177.9(c):

> (c) *Reliance on ruling letters by others.* A ruling letter is subject to modification or revocation without notice to any person, except the person to whom the letter was addressed. Accordingly, no other person should rely on the ruling letter or assume that the principles of that ruling will be applied in connection with any transaction other than the one described in the letter.

2. The tariff provisions under which the imported loose-leaf day planners were classified by Customs and claimed classifiable by Mead, respectively, subheadings 4820.10.20 and 4820.10.40 of the Harmonized Tariff Schedule of the United States ("HTSUS"), are set forth in their entirety[1]:

---

1. Despite the statutory requirement that tariff classification be determined according to the terms of the headings, *see* 19 U.S.C. § 1202, General Rule of Interpretation 1, the Petition fails to recite the superior headings (*i.e.*, 4820 and 4820.10) applicable to 4820.10.20. The Petition also entirely omits 4820.10.40, the tariff provision claimed by Mead. Pet. Cert. 3. The omitted headings highlight the distinction drawn between the larger category of "diaries and similar articles" (with no restrictions as to binding) in heading 4820, and the narrower category "[d]iaries, . . . bound" in 4820.10.20, which clearly excludes both *unbound* diaries and articles *similar* to diaries. Customs asserts that the products at issue should be classified as "diaries, bound," even though they are neither diaries nor bound. The Federal Circuit correctly held that the articles fall within the basket "other" provision of 4820.10.40.

4820 Registers, account books, notebooks, order books, receipt books, letter pads, memorandum pads, diaries and similar articles, exercise books, blotting pads, binders (loose-leaf or other), folders, file covers, manifold business forms, interleaved carbon sets and other articles of stationery, of paper or paperboard; albums for samples or for collections and book covers (including cover boards and book jackets) of paper or paperboard:

4820.10 Registers, account books, notebooks, order books, receipt books, letter pads, memorandum pads, diaries and similar articles

4820.10.20 Diaries, notebooks and address books, bound; memorandum pads, letter pads and similar articles 3.6% (1995)

4820.10.40 Other 0%

COUNTER-STATEMENT OF THE CASE

The Petition arises from the Customs Service's ("Customs") tariff classification of five models of "day planner" — *i.e.*, a loose-leaf arrangement of calendar, address book, notepad and, in some instances, additional material such as a ruler — imported by Respondent The Mead Corporation ("Mead"). The dispute is whether loose-leaf day planners[2] are properly classifiable as "bound diaries" under tariff provision subheading 4820.10.20, or whether — because they are neither "bound" nor "diaries" — the day planners are properly classifiable in the basket "other" provision, subheading 4820.10.40.

2. Although the Petition's "Questions Presented" describe the day planners at issue as "spiral-bound and ring-bound," Pet. Cert. (I), Mead does not import any spiral-bound day planners. Only the classification of loose-leaf day planners is at issue.

This issue arose shortly after the January 1, 1989 effective date of HTSUS, when Customs issued classification rulings which classified other importers' day-planner products under the basket "other" provision, subheading 4820.10.40. *See, e.g.*, Headquarters Ruling ("HQ") 085086 (Sept. 13, 1989), 1989 WL 381276; HQ 085515 (Dec. 14, 1989), 1989 WL 381472. Because Customs regulations precluded Mead from placing any reliance on classification rulings addressed to other importers or non-identical articles, *see* 19 C.F.R. § 177.9(c) ("[N]o other person should rely on the ruling letter or assume that the principles of that [classification] ruling will be applied in connection with any transaction other than the one described in the letter."), Mead requested a classification ruling on the day planners that it was importing. In New York Ruling 864206 (June 19, 1991), 1991 U.S. Custom NY LEXIS 344, Customs classified a Mead day planner, consistent with its classification of the other importers' day planners, under the basket "other" provision, subheading 4820.10.40. Appendix ("App."), *infra*, 1a-3a. That provision imposed no duty.

However, in HQ 953126 (Jan. 11, 1993), 1993 WL 68471, Customs modified its previous ruling and reclassified Mead's loose-leaf day planners as "bound diaries" under HTSUS subheading 4820.10.20, which, at the time, imposed a duty of 4.0%.[3] App., *infra*, 4a-6a. Mead filed administrative protest number 4501-93-100016, contesting the changed classification

3. For the years 1993 and 1994, subheading 4820.10.20 carried a 4.0% rate of duty. Beginning January 1, 1995, the duty rate for goods classifiable thereunder has been annually reduced by .4%. The reductions are scheduled to continue until the duty rate reaches 0% on January 1, 2004. The duty rate for articles classifiable in the tariff provision claimed by Mead, subheading 4820.10.40, has remained unchanged at 0%. The Petition erroneously states that the subheading 4820.10.20 duty rate in 1993 and 1995 was 3.2%. Pet. Cert. 3, 5. The duty rate for those years was actually 4.0% and 3.6%, respectively.

and consequent increase in duty rate. The protest was mooted, however, by Customs' August 18, 1993 approval of Mead's independent request that the entries impacted by HQ 953126 be reliquidated[4] *at no duty* because of Mead's detrimental reliance on the earlier ruling.[5] *See* HQ 953690 (Aug. 18, 1993).[6] App., *infra*, 7a-10a. Since then, Customs has continued to classify various models of Mead's loose-leaf day planners as "bound diaries" under HTSUS provision 4820.10.20. Mead has paid the duty mandated under provision 4820.10.20 and has filed protests of all such classifications.

In 1996, Mead filed a complaint, pursuant to 19 U.S.C. § 1514(a), against Customs in the Court of International Trade ("CIT"), seeking a judgment that Customs had erred in classifying several representative models of Mead's imported loose-leaf day planners as "bound diaries" and that the day

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4. "Liquidation" is a term of art referring to the final accounting between Customs and the importer for the duties owed on an entry. *See* 19 C.F.R. § 159.1.

5. Disregarding the fact that Mead's protest was rendered moot by the detrimental reliance ruling, Customs denied Mead's protest, in HQ 955937 (Oct. 21, 1994), 1994 WL 712863. Appendix to Petition ("Pet. App.") 47a. HQ 955937 is specifically addressed to particular entries for which Mead had already received a refund pursuant to its request for detrimental reliance. Pet. App. 29a. The Petition quotes HQ 955937 extensively, points out that Mead "did not seek judicial review of that classification decision," and suggests that Mead implicitly accepted the classification. Pet. Cert. 8. As Customs is fully aware, Mead's decision not to seek review of that particular ruling was not an acceptance of the classification. Rather, no judicial review of that ruling was necessary, as Mead had already obtained complete relief from any obligation to pay a duty on the affected entries through the August 1993 grant of detrimental reliance relief. App., *infra*, 7a-10a.

6. No Westlaw or Lexis reference is provided for rulings that are not currently available through those public databases.

planners should be properly classified, as they originally had been, under the duty-free basket "other" provision, subheading 4820.10.40. There being no dispute on the facts, both parties immediately moved for summary judgment in the CIT.

Despite the Petition's suggestions to the contrary, neither party sought review of any particular ruling issued by Customs; rather, the parties sought *de novo* review of the appropriate classification for the subject imported merchandise, pursuant to 28 U.S.C. § 2640(a)(1). Customs[7] initially argued that the classification (but not any specific Customs ruling) should be accorded deference under both 28 U.S.C. § 2639(a)(1) and *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See* Defendant's Reply to Plaintiff's Opposition to Defendant's Cross-Motion for Summary Judgment at 2-6. But on December 22, 1997, while the fully briefed summary judgment motions were pending, Customs withdrew its deference arguments in a one-paragraph letter to the CIT:

> Subsequent to the submission of all briefs by the parties on cross-motions for summary judgment in the above-referenced matter, the Court of Appeals for the Federal Circuit rendered a decision in *Rollerblade, Inc. v. United States*, __ Fed. Cir. (T) __, 112 F.3d 481 (1997) ("*Rollerblade*"). The Court of Appeals found that Customs' classification decision was not entitled to deference under either the statutory presumption of correctness (28 U.S.C.

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7. Since the commencement of the CIT proceedings, the United States government has acted as the litigating party on Customs' behalf. For consistency and ease of reference, this Opposition shall use "Customs" to refer to both Customs and the government litigating on behalf of Customs.

> § 2639(a)(1)) or the *Chevron* doctrine (*Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*). *Inasmuch as the government's briefs in this action also discuss the presumption of correctness and deference, we withdraw our arguments to the extent they conflict with the Rollerblade decision.*

App., *infra*, 11a-12a (emphasis added).

The CIT ruled in Customs' favor on the motions for summary judgment, and Mead appealed to the United States Court of Appeals for the Federal Circuit, which has exclusive jurisdiction over appeals from the CIT. *See* 28 U.S.C. § 1295(a)(5). Consistent with Customs' waiver of any claim to deference, Customs did not advance an argument that the Federal Circuit should defer to any underlying Customs rulings. However, after both parties had fully briefed Mead's appeal, this Court rendered its decision in *United States v. Haggar Apparel Co.*, 526 U.S. 380 (1999), and the Federal Circuit issued an Order, dated May 27, 1999, requesting supplemental briefs on the following question:

> How, if at all, does the Supreme Court's decision in *United States v. Haggar Apparel Co.*, 119 S. Ct. 1392 (1999), affect this Court's standard of review of classification rulings issued by the United States Customs Service?

App., *infra*, 13a-14a.

Thereafter, the Federal Circuit reversed the CIT and held that the day planners are properly classifiable under the basket "other" provision, subheading 4820.10.40, which Customs had originally applied. Pet. App. 16a. In reaching its decision, the Federal Circuit held that Customs classification rulings are not entitled to deference under *Chevron*. *Id.* at 5a, 8a. That holding prompted the filing of Customs' Petition.

REASONS FOR DENYING THE WRIT

This case is an inappropriate vehicle for reviewing Customs' claim that deference should be accorded to Customs classification rulings for the following reasons:

1. The Federal Circuit's decision does not conflict with any decision of this Court nor with the decision of any other court of appeals. Consequently, the Federal Circuit's refusal to extend *Chevron* deference to Customs classification rulings lacks the traditional substantive basis for granting certiorari.

2. Petitioner waived its deference claims below, and it is not entitled to this Court's review of its waived claims.

3. There is no classification ruling for which Customs urged deference below, and, consequently, there is no record regarding Customs' procedures for issuing classification rulings for this Court to consider in determining whether deference for such rulings is appropriate.

4. The Federal Circuit's decision will not deprive "importers and the Customs Service [of] effective guidance for a wide range of transactions." Instead, the Federal Circuit's denial of deference to classification rulings continues the regulatory scheme within which importers and the Customs Service have long conducted themselves.

ARGUMENT

I. THE FEDERAL CIRCUIT'S DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR OF ANY OTHER COURT OF APPEALS.

The Petition undertakes to paint a portrait of the Federal Circuit as a rogue circuit, out of step with this Court and other circuits on the bestowal of deference to interpretive decisions of administrative agencies, but the Federal Circuit's decision below, considered in the context of the decisions of this Court and other circuit courts, does not support Petitioner's contentions. The Federal Circuit carefully considered whether the decision in *Haggar* — this Court's most recent statement regarding the deference due interpretive determinations of the Customs Service — required the application of *Chevron* deference to routine Customs classification rulings. The court correctly held that *Haggar* did not require *Chevron* deference. Pet. App. 4a-7a.

The Federal Circuit's decision does not conflict with *Haggar*; it declined to extend the *Haggar* holding to interpretive decisions other than Customs regulations, the subject to which this Court's *Haggar* decision was expressly limited. *See* 526 U.S. at 383 ("The question is whether these *regulations*, deemed controlling by the Treasury, are entitled to judicial deference in a refund suit brought in the Court of International Trade. . . . [W]e hold the *regulation* in question is subject to the analysis required by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). . . .") (emphasis added). In *Haggar*, this Court did not address Customs classification rulings, and the Federal Circuit, addressing *Haggar*'s impact on the appeal before it, properly explored the distinctions

between the notice-and-comment published regulations accorded deference in *Haggar* and the ordinary Customs classification rulings that are the subject of the Petition.[8]

In according *Chevron* deference to Customs regulations, this Court recognized that notice-and-comment regulations, like a statute, are binding upon the public; they "help to define the legal relations between the Government and regulated entities" by "clarify[ing] the rights and obligations of importers." *Haggar*, 526 U.S. at 388. Like statutes, Customs regulations establish legal norms to which the public — all importers of the affected goods — must adhere. Customs classification rulings, unlike Customs regulations, are limited by regulation to the precise importer and merchandise addressed therein. *See* 19 C.F.R. § 177.9(b)(2) ("Each ruling letter setting forth the proper classification of an article under the provisions of the [HTSUS] will be applied *only with respect to transactions involving articles identical* to the sample submitted with the ruling request or to articles whose description is identical to the description set forth in the ruling letter.") (emphasis added); § 177.9(c) ("A ruling letter is subject to modification or revocation without notice to any person, except the person to whom the letter was addressed. Accordingly, *no other person should rely on the ruling letter or assume that the principles of that ruling will be applied in connection with any transaction other than the one described in the letter.*") (emphasis added). Rather than constituting a legal directive by which importers may guide their behavior, Customs classification rulings merely constitute an application of legal rules to a particular factual situation, without precedential effect on any other factual

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8. The Federal Circuit reserved opinion on Customs classification rulings that undergo notice-and comment procedures, such as those provided for in 19 C.F.R. § 177.10(c). Pet. App. 6a.

situation. This is not the type of administrative interpretation to which *Chevron* and *Haggar* were directed.[9] Far from conflicting with any of this Court's decisions, the Federal Circuit's decision not to extend this Court's *Haggar* holding was entirely consistent with this Court's jurisprudence.[10]

Nor did the decision below conflict with the decisions of any other courts of appeals. There is certainly no direct conflict, as the Federal Circuit has exclusive jurisdiction over the subject matter of Customs classification decisions. *See* 28 U.S.C. § 1295(a)(5) (Federal Circuit exclusive

9. Customs' arguments in the *Haggar* litigation reflect Customs' own recognition of the crucial distinction between its regulations and its classification rulings. The underlying dispute in *Haggar* involved not only the regulation addressed by this Court (19 C.F.R. § 10.16(c)), but also a classification ruling interpreting the regulation. *See* HQ 819794 (Oct. 10, 1986). Customs, however, conspicuously omitted consideration of the ruling from its petition for certiorari. Cementing Customs' own dismissive views of its own rulings, Customs then argued before this Court that "[p]roceedings in the Tax court . . . like the proceedings in the Court of International Trade on customs protests, are 'unlike judicial review of the actions of other agencies [in that] any "record" made in the Service, including the reasons for its assessment, is irrelevant.' " Reply Brief for the United States at 3 n.2, *Haggar* (No. 97-2044) (quoting M.I. Saltzman, *IRS Practice and Procedure* ¶ 1.05[2][a], at 1-31 (2d ed. 1991)). In other words, Customs informed this Court that its rulings — which contain Customs' expression of the reasoning behind classifications decisions — are to be disregarded when the decisions are subjected to judicial review.

10. Customs' reliance on this Court's decision in *Zenith Radio Corp. v. United States*, 437 U.S. 443 (1978), for the proposition that this Court had, prior to *Chevron*, extended something less than *Chevron* deference to Treasury statutory interpretations, is misplaced. Pet. Cert. 16-17. In *Haggar*, this Court referenced *Zenith* for historical context, but did not cite it as authority to extend *Chevron* deference to Customs notice-and-comment regulations. *See* 526 U.S. at 393.

jurisdiction over appeals from CIT); § 1581(a) (CIT exclusive jurisdiction over protests of Customs classification decisions). But, more importantly, there is no merit to Petitioner's efforts to create the illusion of a conflict by arguing that the Federal Circuit's judgment is incompatible with the grand scheme of judicial treatment of *all* administrative rulings. On the contrary, the Federal Circuit's judgment is consistent with court of appeals decisions concerning the accordance of *Chevron* deference to analogous administrative rulings.

The Federal Circuit's denial of deference for Customs rulings was informed by this Court's analogy between customs and tax matters, *see Haggar*, 526 U.S. at 394, and was based upon the observation that this Court has accorded deference to IRS regulations, *see Atlantic Mut. Ins. Co. v. Commissioner*, 523 U.S. 382, 389 (1998), but has not extended deference to IRS interpretive rulings. *See Commissioner v. Schleier*, 515 U.S. 323, 336 n.8 (1995) (noting that IRS interpretive rulings "do not have the force and effect of regulations" (quoting *Davis v. United States*, 495 U.S. 472, 484 (1990))); *see also United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 518 n.9 (1992) (declining to be guided by inapposite IRS rulings "[e]ven if they were entitled to deference"). Likewise, following this Court's direction, the various courts of appeals have consistently declined to apply *Chevron* deference to Revenue Rulings issued by the IRS. *See, e.g., Estate of Kosow v. Commissioner*, 45 F.3d 1524, 1528 n.4 (11th Cir. 1995) (revenue ruling is "merely an opinion of an IRS attorney" and is "not binding on the courts"); *First Chicago NBD Corp. v. Commissioner*, 135 F.3d 457, 458-59 (7th Cir. 1998) (not applying *Chevron* deference, but lesser standard of "respectful consideration"); *Wood v. Commissioner*, 955 F.2d

908, 913 (4th Cir. 1992) (not applying *Chevron* deference, but lesser standard of "considerable weight").[11] Indeed, the Federal Circuit concluded that Customs classification rulings are "an even less formalized body of interpretation than IRS revenue rulings," Pet. App. 7a, and, therefore, even less worthy of *Chevron* deference. Rather than conflicting with other courts, the Federal Circuit's reasoning by analogy to IRS rulings illustrates that the Federal Circuit's holding is entirely consistent with the decisions of the other courts of appeals.

Petitioner also contends that the Federal Circuit has created an issue worthy of certiorari by supposedly declining to accord to Customs classification rulings deference at a reduced (but unspecified) level — something other than "controlling weight" established in *Chevron*. 467 U.S. at 844. The Federal Circuit did not decline to apply reduced deference because it was never *asked* to apply a reduced standard of deference.[12] However, even if the issue had been properly before the court below, rejection of a reduced deference standard would have been appropriate. Neither *Haggar* nor any other decision of this Court or of any court of appeals suggests, let alone provides authority for, the proposition that Customs classification rulings are entitled to any kind of deference.

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11. Pending before the Court is *MCI Communications Corporation, et al. v. United States*, Petition No. 97-1176, which seeks certiorari on the form of lesser deference, if any, applicable to IRS Revenue Rulings. The lesser deference claim in *MCI* was expressly raised before and addressed by the court of appeals. Here, on the other hand, the claim to lesser deference was never raised nor considered below. *See* Argument II, *infra* at 13.

12. *See* discussion in Argument II, *infra* at 13-15.

There is simply no conflict here between the Federal Circuit decision and any decision of this Court or of any court of appeals. The Federal Circuit decision is in harmony with *Haggar*, and the writ of certiorari should be denied.

II. IT IS INAPPROPRIATE TO REVIEW PETITIONER'S DEFERENCE CLAIMS IN VIEW OF PETITIONER'S WAIVER OF ITS DEFERENCE ARGUMENTS BELOW.

As clearly reflected in Customs' December 22, 1997 letter to the CIT, App., *infra*, 11a-12a, Customs expressly and unequivocally waived any claim that its classification rulings are entitled to *Chevron* deference.[13] Accordingly, this is an unsuitable case for a grant of the writ of certiorari. Once a party has withdrawn a claim, absent exceptional circumstances (which are not present here), it is prohibited from reasserting that claim before this Court. *See Helvering v. Wood*, 309 U.S. 344, 348-49 (1940) (precluding IRS from asserting claim that it had expressly abandoned below); *United States v. Alvarez-Sanchez*, 511 U.S. 350, 360 n.5 (1994) (and cases cited therein).

Like the waiver of its *Chevron* deference claims, it is indisputable that Customs failed to raise, and the lower

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13. A litigant's decision to insert, drop, or omit claims often involves a broad mix of strategic, factual and legal factors. Nevertheless, whatever the reason, once a claim is waived, an appellate court should not revive it. *See Motorola, Inc. v. Interdigital Tech. Corp.*, 121 F.3d 1461, 1467 (Fed. Cir. 1997) ("This Court has no legal warrant to correct a party's litigation errors or to review questions not preserved for appeal"); *Violette v. Smith & Nephew Dyonics, Inc.*, 62 F.3d 8, 11 (1st Cir. 1995), *cert. denied*, 517 U.S. 1167 (1996).

courts never addressed, a non-*Chevron* deference claim for a classification ruling regarding the Mead day planners.[14] Just as issues waived below will not be considered by this Court, issues that were neither raised below nor considered by the lower courts will not be accepted and addressed by this Court. *See E.E.O.C. v. Federal Labor Relations Auth.*, 476 U.S. 19, 24 (1986) (dismissing writ of certiorari as improvidently granted because this Court's "normal practice, from which we see no reason to depart on this occasion, is to refrain from addressing issues not raised in the Courts of Appeals."); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 148 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.").

Further, although not expressly stated, Customs' December 22, 1997 letter to the CIT, which expressly waived *Chevron* deference, also implicitly waived non-*Chevron* deference. That letter withdrew Customs' arguments "to the extent they conflict with the *Rollerblade* decision." App., *infra*, 12a. In *Rollerblade*, the Federal Circuit held that "*no deference* attaches to Customs' classification decisions either under 28 U.S.C. § 2639 or under *Chevron*

14. After the Federal Circuit had decided in favor of Mead, Customs filed a Petition For Rehearing En Banc, in which, for the first time, Customs referenced cases in which courts addressed non-*Chevron* deference. Yet even in this limited context, Customs made no express argument that the court should accord some lesser degree of deference to Customs classification rulings. Moreover, it is the practice in the Federal Circuit, as in other courts of appeals, not to consider arguments raised initially in a rehearing petition. *See Pentax Corp. v. Robison*, 135 F.3d 760, 762 (Fed. Cir. 1998); *accord United States v. Bongiorno*, 110 F.3d 132, 133 (1st Cir. 1997); *Boardman v. Estelle*, 957 F.2d 1523, 1535 (9th Cir. 1992), *as supplemented on denial of rehearing, cert. denied*, 506 U.S. 904 (1992).

where there are no disputed issues of material fact." *Rollerblade, Inc. v. United States*, 112 F.3d 481, 484 (Fed. Cir. 1997) (emphasis added). The inartful language of the waiver letter, coupled with Customs' failure to raise any lesser deferential standard previously in this litigation, can only lead to the conclusion that the letter was intended to waive all claims of deference, pursuant to *Chevron* or otherwise.

III. THE RECORD BELOW IS INADEQUATE TO PERMIT CONSIDERATION OF THE DEFERENCE ISSUE RAISED IN THE PETITION.

Because of Customs' deliberate waiver of its claim to *Chevron* deference and its complete failure to raise a claim to a lesser deferential standard, the record below is inadequate to permit a meaningful analysis of whether Customs' interpretive rulings should be entitled to the deference now claimed. This Court should not grant a writ of certiorari where the record below is inadequate to support consideration of the questions presented. *See, e.g., Pilcher v. Mississippi*, 420 U.S. 938 (1975) (denying petition for writ of certiorari "for consideration of questions not adequately presented by the record before us"). Here, the Petition seeks review of whether deference should be accorded to Customs' interpretive rulings, but the record is missing the essential element — an interpretive ruling. There was *no* ruling at issue in the proceedings below. Rather, as discussed *supra* at 5, Mead sought review of the specific classification applied to its day planners; it did not seek review of any specific interpretive ruling, and none was before the CIT and the Federal Circuit.[15] Customs has chosen to append HQ 955937, 1994 WL 712863, to its Petition, Pet. App. 28a-47a,

15. When an importer contests the denial of a protest of a classification decision, the CIT reviews the classification decision, not the underlying reasoning or any particular ruling. *See* 28 U.S.C. § 2640(a)(1) (CIT reviews classification decision *de novo*).

but neither Mead nor Customs ever sought review of that ruling, in part because all of the entries to which the ruling pertained were reclassified as duty-free pursuant to Mead's detrimental reliance claim. *See* n.5, *supra* at 4.

Since there is no specific interpretive ruling for which deference was sought, the record lacks the necessary foundation to determine whether Customs' classification rulings are the type of administrative determination that is entitled to deference under *Chevron*. In *Chevron* this Court conducted an extensive review of the legislative and regulatory history related to the challenged regulations that had been promulgated by the Environmental Protection Agency. 467 U.S. at 853-65. It reached its deference decision only after determining that "the regulatory scheme [was] technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies." *Id.* at 865. To perform a corresponding analysis of Customs classification rulings, this Court would require a record that established, *inter alia*, the scheme under which the rulings are made, the volume of rulings coming out of the agency, the number of different offices from which the rulings originate, the consistency of guidance for the issuance of rulings from various offices, the internal process for issuing rulings, the qualifications of the personnel making the rulings and the policy considerations (if any) that go into the ruling process. However, because the deference issue was not raised below, the record is utterly devoid of this information, which is crucial to analyzing Customs rulings under *Chevron*, and the decision below is not appropriate for review by this Court.

IV. RATHER THAN DEPRIVING IMPORTERS AND THE CUSTOMS SERVICE OF EFFECTIVE GUIDANCE, THE FEDERAL CIRCUIT'S DECISION TO DENY *CHEVRON* DEFERENCE PRESERVES THE GUIDANCE UNDER WHICH CUSTOMS AND IMPORTERS HAVE HISTORICALLY CONDUCTED THEIR AFFAIRS.

The Petition includes a policy argument that without *Chevron* deference (or some unspecified lesser deference), Customs and importers are suddenly left adrift, with guidance only available through expensive litigation. Customs contends that the Federal Circuit's refusal to honor Customs classification rulings with judicial deference alters the legal terrain and creates undesirable uncertainty. Contrary to Customs' assertions, the Federal Circuit's decision accords with a consistent series of Federal Circuit and CIT decisions declining to defer to Customs classification rulings. *See Rollerblade*, 112 F.3d at 484; *Crystal Clear Indus. v. United States*, 44 F.3d 1001, 1003 n.* (Fed. Cir. 1995); *Anval Nyby Powder AB v. United States*, 927 F. Supp. 463, 469 (Ct. Int'l Trade 1996); and *Semperit Industrial Products, Inc. v. United States*, 855 F. Supp. 1292, 1299-1300 (Ct. Int'l Trade 1994). Indeed, since the enactment of the Tariff Laws more than 200 years ago, Customs classification rulings have never been accorded *Chevron* or quasi-*Chevron* judicial deference. *See* S. Rep. No. 96-249, 96th Cong., 1st Sess. 251 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 637 ("antidumping and countervailing duty determinations, *unlike traditional value and classification decisions*, are not subject to *de novo* review") (emphasis added) (discussed *infra* at 19-20); *see also, e.g.*, *In re Two Hundred Chests of Tea*, 22 U.S. (9 Wheat.) 430 (1824) (according no deference to Customs classification determination); *Rollerblade*, 112 F.3d at 484 (holding Customs classification rulings not entitled to *Chevron* deference).

Considering the administrative framework within which the rulings are spawned, the absence of deference makes perfect sense. Customs regulation 19 C.F.R. § 177.9(c) provides that a Customs classification ruling and the principles enunciated therein are binding on Customs *only if the importer and the merchandise remain identical*. If either the importer or the merchandise differs from that which was identified in a "binding" classification ruling, Customs is not bound by its ruling, and may, in fact, completely ignore its own precedent. *See, e.g.*, HQ 960977 (June 7, 1999) (citing 19 C.F.R. § 177.9(c) and refusing to consider classification ruling to different importer on "similar" articles). Ironically, Customs wants this Court to extend greater deference to Customs classification rulings than it is willing to extend to its own rulings.

Customs' reluctance to place faith in its own rulings is understandable considering that Customs regularly issues more than 10,000 rulings a year, and it is authorized to issue rulings from all of its 200-plus ports of entry. *See* 19 C.F.R. § 177.2(b)(2)(ii)(B); 19 C.F.R. § 101.3(b)(1). It is inevitable that such a massive daily outpouring of rulings will result in conflicting determinations. In fact, Customs has promulgated a regulation entitled "Inconsistent Customs Decisions" to address this unavoidable situation. 19 C.F.R. § 177.12.

Petitioner's reliance on the language of 19 U.S.C. § 1502(a) — directing the Secretary of the Treasury to publish regulations "establishing procedures for the issuance of binding rulings prior to the entry of the merchandise concerned" — is misplaced and misleading. The Petition suggests that, by empowering Customs to make "binding rulings," Congress tacitly advocated the application of *Chevron* deference to Customs rulings. Pet. Cert. 13. On the contrary, as reflected in the legislative history and in comparison with other statutes, the authorization to issue binding rulings was never intended nor designed to limit *de novo* review of Customs classification rulings.

The "binding ruling" language of § 1502(a) was added in 1993 for the sole purpose of providing each *importer* with greater certainty with respect to its future importation of the same goods, not for providing Customs with greater authority: "These amendments will provide greater certainty to *importers* through the binding rulings program while also permitting Customs to accelerate the entry process." H. Rep. No. 103-361 (I), 103rd Cong., 1st Sess. 138 (1993), *reprinted in* 1993 U.S.C.C.A.N. 2552, 2688 (emphasis added). In view of the high volume of Customs rulings issuing simultaneously from so many different offices, importers need assurance that if they receive a binding ruling from, say, New York Customs, the same goods imported through another U.S. Customs port, *e.g.*, Seattle, will be classified and appraised identically. *Chevron* deference is immaterial to the certainty required by importers.

If, as Customs contends, Congress had intended to alter the judicial review applicable to Customs classification rulings, it would have done so explicitly, not implicitly. In the legislative history underlying the Trade Agreements Act of 1979, which amended the judicial review portions of the statute, the intent to change the existing judicial standards of review was expressly addressed:

> The Treasury Department has consistently asserted that antidumping and countervailing duty determinations, *unlike traditional value and classification decisions*, are not subject to *de novo* review. . . .
>
> Section 516A would remove all doubt on whether *de novo* review is appropriate by excluding *de novo* review from consideration as a standard in antidumping and countervailing duty determinations.

S. Rep. No. 96-249, 96th Cong., 1st Sess. 251 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 637 (emphasis added). Congress then enacted 19 U.S.C. § 1516a(b), which expressly provides the judicial standards of review — *e.g.*, arbitrary and capricious, abuse of discretion, substantial evidence — to be applied to the administrative countervailing duty and antidumping duty determinations specified therein. It did not, however, enact a new standard of review for appeals from classification rulings. Review of classification rulings was *de novo* before the Trade Agreements Act of 1979, and Congress allowed it to remain so thereafter. This legislative history behind Congress's acts in 1979 and 1993 illustrates: (1) that both Congress *and* the Treasury Department have historically acknowledged that Customs classification decisions are subject to *de novo* judicial review; (2) that when Congress intends to change the scope of judicial review, it does so expressly, not by implication; and (3) that Congress has not changed the review standard for appeals from classification rulings.

There is no basis for Petitioner's prediction that the courts' refusal to defer to Customs classification rulings will lead to an increase in "wasteful litigation," particularly when the Federal Circuit's decision does nothing more than maintain the status quo. Pet. Cert. 13. However, endowing the rulings with controlling legal authority would deprive importers of a meaningful avenue of review of Customs classifications and most certainly would result in an increase in uncontested duties paid to Customs. In any event, considered in light of the lack of authority that Customs gives to its own rulings, Petitioner's policy argument is hollow, and provides no basis for this Court to grant the writ of certiorari.

CONCLUSION

Customs' Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — NY RULING 864206 FROM DEPARTMENT OF THE TREASURY, U.S. CUSTOMS SERVICE TO O'NEILL & WHITAKER, INC. DATED JUNE 19, 1991

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE
NEW YORK, N.Y.

NY 864206

JUN 19 1991

CLA-2-48:S:N1:234 864206

CATEGORY: Classification

TARIFF NO.: 4820.10.4000

Mr. Michael O'Neill
O'Neill & Whitaker, Inc.
1809 Baltimore Avenue
Kansas City, MO 64108

RE: The tariff classification of a personal planner from Taiwan.

Dear Mr. O'Neill:

In your letter dated June 4, 1991, on behalf of The Mead Corporation, you requested a tariff classification ruling.

A sample of the item in question, a "Personal Planner" (Item No. 47104), was submitted and will be returned as requested. It is a 3 x 14 x 20 cm looseleaf book consisting of

a metal six-ring binder mechanism, complete with pages, permanently mounted inside a vinyl cover. The pages are essentially blank paper inserts grouped into various sections, each distinguished by lines and captions intended to facilitate particular kinds of written entries. The main sections are for monthly and daily activities, meeting notes, and telephone/address listings. The book also contains a page for personal data, a printed six-year calendar page, a fold-out map accompanied by handy reference information, two plastic pages designed to hold cards and other small items, and a plastic page-finder/ruler.

In addition, there is a note pad which may either be stored in a pocket provided on the inside of the back cover or mounted in the binder. The inside of the front cover also incorporates storage pockets, and the book features a strap/snap closure.

The applicable subheading for the No. 47104 "Personal Planner" will be 4820.10.4000, Harmonized Tariff Schedule of the United States (HTS), which provides for other (non-enumerated) articles similar to registers, account books, notebooks, receipt books and diaries. The rate of duty will be free.

A paper sleeve, which you identify as a "sale tag," fits over the front cover of the planner. This sleeve is printed with the brand name of the item, certain product information, and The Mead Corporation's name and U.S. address followed by the words, "Made in Taiwan." You ask for confirmation that this country of origin marking is acceptable.

Although we find that the marking is in a conspicuous place and is legible, we also note that it lacks the degree of permanence that other methods could easily provide. While you indicate that Mead "will only sell this product with the sale tag," there is no assurance that the tags will always remain on the planners prior to retail sale. To avoid potential problems in this regard, it is therefore recommended that the country of origin also be stamped on the inside of the front cover, placed on a sewn-in label, or printed on the "contents page" at the front of the book.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

Sincerely,

s/ Jean F. Maguire
Jean F. Maguire
Area Director
New York Seaport

APPENDIX B — HEADQUARTERS RULING 953126 FROM DEPARTMENT OF THE TREASURY, U.S. CUSTOMS SERVICE TO O'NEILL & WHITAKER, INC. DATED JANUARY 11, 1993

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE
WASHINGTON, D.C.

HQ 953126

11 JAN 1993

CLA-2 CO:R:C:T 953126 CAB

CATEGORY: Classification

TARIFF NO.: 4820.10.2010

Mr. Michael O'Neill
O'Neill & Whitaker, Inc.
1809 Baltimore Avenue
Kansas City, MO 64108

RE: Modification of New York Ruling Letter (NYRL) 864206 dated June 19, 1991

Dear Mr. O'Neill:

New York Seaport has requested that this office review NYRL 864206 dated June 19, 1991. Since the issuance of that ruling, our position on the classification of multi-function ring-binder books or daily planners has been modified. Accordingly, this ruling modifies NYRL 864206.

Appendix B

NYRL 864206 concerned the classification of a multi-function ring-binder book, referred to as a "Personal Planner". This "Personal Planner" was comprised of a calendar, a daily planner, an address book, a fold-out map, card holders, a ruler, and a notepad. In NYRL 864206, Customs concluded that the merchandise at issue was classifiable in subheading 4820.10.4000, HTSUSA, the duty-free provision for other (non-enumerated) articles similar to registers, account books, notebooks, receipt books and diaries. Customs determined that the submitted sample, commercially referred to as a "daily planner", was considered a looseleaf book with multi-functions.

After further review, concerning the classification of daily planners or multi-function looseleaf binders, Customs has modified its position on the applicable classification. In Headquarters Ruling Letter (HRL) 089960 dated February 10, 1992, Customs ruled that multi-function looseleaf binders or daily planners are generally used for daily recordkeeping and are classifiable as diaries. HRL 089960 also makes a distinction regarding whether the merchandise at issue is bound and classifiable as a diary under subheading 4820.10.2010, HTSUSA, or not bound and classifiable as an article similar to a diary under subheading 4820.10.4000, HTSUSA. Accordingly, the "Personal Planner" is properly classifiable under subheading 4820.10.2010, HTSUSA. The rate of duty is 4 percent *ad valorem*.

In order to ensure uniformity in Customs classification of this merchandise and eliminate uncertainty, we are modifying NYRL 864206 to reflect the above classification effective with the date of this letter. However, if after your

review, you disagree with the legal basis for our decision, we invite you to submit any arguments you might have with respect to this matter for our review. Any submission you wish to make should be received within thirty (30) days of the date of this letter.

This notice to you should be considered a modification of NYRL 864206 under 19 CFR 177.9(d)(1). It is not to be applied retroactively to NYRL 864206 (19 CFR 177.9(d)(2)) and will not, therefore, affect past transactions for the importation of your merchandise under that ruling. However, for the purposes of future transactions of merchandise of this type, NYRL 864206 will not be valid precedent. We recognize that pending transactions may be adversely affected by this modification, in that current contracts for importation arriving at a port subsequent to this decision will be classified pursuant to it. If such a situation arises, you may, at your discretion, notify this office and apply for such relief from the binding effects as may be warranted by the circumstances. However, please be advised that in some instances involving import restraints, such relief may require separate approvals from other government agencies.

Sincerely,

s/ John Durant
John Durant, Director
Commercial Rulings Division

APPENDIX C — HEADQUARTERS RULING 953690 FROM DEPARTMENT OF THE TREASURY, U.S. CUSTOMS SERVICE TO LAMB & LERCH DATED AUGUST 18, 1993

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE
WASHINGTON, D.C.

AUG 18 1993

HQ 953690

CLA-2 CO:R:C:T 953690 CAB

CATEGORY: Classification

TARIFF NO.: 4820.10.4000

Sidney H. Kuflik, Esq.
Lamb & Lerch
233 Broadway
New York, NY 10279

RE: Detrimental Reliance; modification of NYRL 864206; HRL 953126 of January 11, 1993, effective date delayed pursuant to 19 CFR 177.9(d)(3) through April 11, 1993

Dear Mr. Kuflik:

This is in reply to your letter of March 23, 1993, on behalf of your client, Mead Corporation, [hereinafter "Mead"] in which you requested that the effective date of Headquarters Ruling Letter (HRL) 953126, dated January 11, 1993, be delayed through April 11, 1993, with respect to Mead.

Appendix C

In HRL 953126, Customs modified New York Ruling Letter (NYRL) 864206, dated June 19, 1991. NYRL 864206 classified Style 47102, a looseleaf book bound by a metal six-ring binder in subheading 4820.10.4000 of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which is the duty-free provision for other (non-enumerated) articles similar to registers, account books, notebooks, receipt books and diaries. Other relevant New York Rulings were also issued to Mead concerning daily planners and classified such merchandise under subheading 4820.10.4000, HTSUSA. These additional rulings were NYRL 866926, dated September 17, 1991, which dealt with Style 47106; NYRL 864284, dated June 21, 1991, which concerned Style 47102; and NYRL 864206, dated June 19, 1991, which concerned Style 47104. In HRL 953126, Customs concluded that Style 47102, commercially referred to as a "daily planner", was a looseleaf book with multi-functions. HRL 953126 reclassified Style 47102 in subheading 4820.10.2010, HTSUSA, with a duty rate of 4 percent *ad valorem*.

In your submission, you state that in reliance upon the cited New York rulings, Mead placed a series of purchase orders for daily planners with corresponding style numbers of 47102, 47103, 47104, 47105, 47106, 47107. You maintain that Mead set its prices for its 1993 day planners based on the issued New York rulings. You also state that the day planners at issue are sold and marketed primarily during the back to school period prior to September 1, 1993, and it would be impractical for Mead to increase its prices prior to the beginning of this period.

Appendix C

You contend that the daily planners at issue are substantially identical to the daily planners which were the subject of the cited New York rulings issued to Mead in 1991. Therefore, Mead relied upon the cited New York rulings to classify the daily planners at issue in this instance. Since NYRL 864206 was modified, effective January 11, 1993, Mead suffered a detriment with regard to the merchandise that was contracted for prior to January 11, 1993. You assert that Mead acted reasonably and in good faith in its reliance on NYRL 864206 and the other New York rulings issued contemporaneously in 1991, both when pricing and classifying the merchandise. Under 19 C.F.R. 177.9(d)(3), the effective date of a ruling letter that modifies or revokes an earlier ruling may be delayed for a period of up to ninety (90) days, provided that the party seeking delay can demonstrate to the satisfaction of the Customs Service that reliance on the revoked or modified ruling was reasonable and such reliance was to the detriment of that party.

After examining the submitted information which consists of purchase orders backed by letters of credit and affidavits signed by officials of Mead, it appears that Mead suffered a detriment because merchandise contracted for prior to the issuance of HRL 953126 is presently subject to a higher duty rate. It was reasonable for Mead to rely on the rate of duty set forth in the cited New York rulings, and therefore, the prerequisite for relief under 19 C.F.R. 177.9(d)(3) has been met. Any relief provided by Customs, however, shall *not* extend to purchase orders placed after January 11, 1993.

Based upon your submission, and pursuant to the regulations set forth above, the effective date of HRL 953126

is delayed by ninety (90) days, (i.e., no later than April 11, 1993) for purposes of liquidating or reliquidating the following entries: 595-0111948-7; 595-0113032-8; 595-0113516-0; 595-0115974-9; 595-0115980-6; 595-0116904-5; 595-0117838-4; 595-0118560-3; 595-0119466-2; 595-0120254-9; 595-0121642-4; 595-0121650-7; 595-0122798-3; 595-0123332-0; 595-0123922-8; 595-0124664-5; 595-0125010-0; 595-0125224-7; 595-0125226-2; 595-0125234-6; 595-0126048-9; 595-0126060-4; 595-0126062-0; 595-0126064-6; 595-0126066-1; 595-0126068-7; 595-0126256-8; 595-0126258-4; 595-0126318-6; 595-0126320-2; 595-0126894-6; 595-0126898-7; 595-0126900-1; 595-0126902-7; 595-0126906-8; 595-0126908-4; 595-0127058-7; 595-0127276-5; 595-0127282-3; 595-0127284-9.

Accordingly, through April 11, 1993, the merchandise consisting of Style Numbers 47102, 47103, 47104, 47105, 47106, and 47107, imported under the foregoing entry numbers should be classified duty free under subheading 4820.10.4000, HTSUSA.

Sincerely,

s/ John Durant
John Durant, Director
Commercial Rulings Division

APPENDIX D — LETTER FROM U.S. DEPARTMENT OF JUSTICE, CIVIL DIVISION TO HONORABLE JAMES L. WATSON, UNITED STATES COURT OF INTERNATIONAL TRADE DATED DECEMBER 22, 1997

U.S. Department of Justice
Civil Division

AMR
95-12-01783

International Trade Field Office
Commercial Litigation Branch
26 Federal Plaza, Room 346
New York, New York 10278-0140
Phone 212/264-9230
FAX 212/264-1916

December 22, 1997

Honorable James L. Watson
United States Court of International Trade
One Federal Plaza
New York, New York 10007

Re: Re: The Mead Corporation v. United States,
Court No. 94-06-00346

Dear Senior Judge Watson:

Subsequent to the submission of all briefs by the parties on cross-motions for summary judgment in the above-referenced matter, the Court of Appeals for the Federal Circuit rendered a decision in *Rollerblade, Inc. v. United States*, __ Fed. Cir. (T) __, 112 F.3d 481 (1997) ("*Rollerblade*"). The Court of Appeals found that Customs' classification

decision was not entitled to deference under either the statutory presumption of correctness (28 U.S.C. §2639(a)(1)) or the Chevron doctrine (*Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*). Inasmuch as the Government's briefs in this action also discuss the presumption of correctness and deference, we withdraw our arguments to the extent they conflict with the *Rollerblade* decision.

Very truly yours,

Amy M. Rubin
Trial Attorney

cc: Sidney H. Kuflik, Esq.

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DATED AND FILED MAY 27, 1999

NOTE: Pursuant to Fed. Cir. R. 47.6 this order is not citable as precedent. It is a public order.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

98-1569

THE MEAD CORPORATION,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Before NEWMAN, RADER, and SCHALL, *Circuit Judges*.

ORDER

The parties shall file supplemental briefs, not to exceed 20 pages in length, on or before June 28, 1999.

Only the following question is to be addressed in the briefs:

How, if at all, does the Supreme Court's decision in *United States v. Haggar Apparel Co.*, 119 S. Ct. 1392 (1999),

affect this court's standard of review of classification rulings issued by the United States Customs Service?

FOR THE COURT,

May 27, 1999

s/ Jan Horbaly (AV)
Jan Horbaly
Clerk

cc: Amy M. Rubin, Esq.
Sidney H. Kuflik, Esq.

Supreme Court, U.S.
FILED
MAY 09 2000
CLERK

No. 99-1434

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

THE MEAD CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF AUTHORITIES

Cases:

Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 468 U.S. 1227 (1984) 3
Christensen v. *Harris County*, No. 98-1167 (May 1, 2000) 2, 3, 4
Reno v. *Koray*, 515 U.S. 50 (1995) 4
Skidmore v. *Swift & Co.*, 343 U.S. 134 (1944) 2, 4
Smiley v. *Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996) 3
United States v. *Correll*, 389 U.S. 299 (1967) 4, 7
United States v. *Haggar Apparel Co.*, 526 U.S. 380 (1999) 5, 6
Zenith Radio Corp. v. *United States*, 437 U.S. 443 (1978) 2, 4

Statute and regulation:

19 U.S.C. 1502(a) 1, 2
19 C.F.R.:
§ 177.9(a) 1, 2, 7
§ 177.9(b)(2) 2
§ 177.9(c) 2

Miscellaneous:

Kenneth C. Davis & Richard J. Pierce, *Administrative Law Treatise* § 2.5 (3d ed. 1994) 3

In the Supreme Court of the United States

No. 99-1434

UNITED STATES OF AMERICA, PETITIONER

v.

THE MEAD CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

1. In 19 U.S.C. 1502(a), Congress expressly authorized the Customs Service to adopt and issue "binding rulings" to address and resolve tariff classification issues. Pursuant to that statute, the agency has specified that a (19 C.F.R. 177.9(a))

> ruling letter [thus] issued by the Customs Service * * * represents the official position of the Customs Service with respect to the particular transaction or issue described therein and is binding on all Customs Service personnel * * * until modified or revoked. In the absence of a change of practice or other modification or revocation which affects the principle of the ruling set forth in the ruling letter, that principle may be cited as author-

ity in the disposition of transactions involving the same circumstances.

The court of appeals held in this case that these official, "binding" interpretations of the Tariff Act that have been formally adopted by the Customs Service in the precise manner that Congress has specified are entitled to "no deference" (Pet. App. 7a).[1] For the reasons stated in the petition, and especially in view of this Court's recent decision in *Christensen* v. *Harris County*, No. 98-1167 (May 1, 2000), that holding warrants this Court's plenary review.

This Court has long held that interpretive rulings that set forth the Treasury's formal interpretations of revenue laws such as the Tariff Act are to be sustained if they reflect a "sufficiently reasonable" elaboration of the statutory scheme. *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978). In *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), on which this Court recently relied in the *Christensen* case, the Court emphasized that it "has long given considerable and in some cases

[1] Respondent attempts to create the impression (Br. in Opp. 9) that the "binding rulings" adopted under this statute are not really binding because the regulations caution that they are "subject to modification or revocation without notice" (19 C.F.R. 177.9(c)) and apply "only with respect to transactions involving articles identical" to those addressed in the ruling request (19 C.F.R. 177.9(b)(2)). Respondent fails to cite the general regulatory provision which specifies that, unless modified or revoked, the classification rulings adopted by the agency under these procedures "may be cited as authority in the disposition of transactions involving the same circumstances." 19 C.F.R. 177.9(a). In stating that it would give no deference to such classification rulings (Pet. App. 7a), the court of appeals did not question that these rulings were properly adopted as "binding rulings" under 19 U.S.C. 1502(a).

decisive weight to Treasury Decisions and to interpretative regulations of the Treasury and of other bodies that were not of adversary origin." 323 U.S. at 140. As we explain in the petition in this case (Pet. 14-17), because Congress tasked the agency with the responsibility of formally developing and announcing these "binding rulings," the reasoning of this Court's decision in *Chevron* applies directly here: courts are to defer to the agency's reasonable interpretation of the statute because of the "presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-741 (1996).

This is not a case like *Christensen*, in which the Court recently concluded that a lesser standard of deference applies to an agency opinion issued in a format (such as correspondence) that "Congress has not authorized for that purpose" (1 Kenneth C. Davis & Richard J. Pierce, *Administrative Law Treatise* § 3.5, at 120 (3d ed. 1994), cited with approval at *Christensen* v. *Harris County*, *supra*, slip op. 11). In the present case, the format selected by the agency—the formal adoption and issuance of binding interpretive rulings—is *precisely* the format "authorized [by Congress] for this purpose." *Ibid.* And, in this context, this Court has long held that the rulings formally adopted by the Treasury to interpret the revenue laws of the United States in the manner (and format) that Congress has specified are entitled to substantial deference and are to be upheld if they "implement the congressional mandate in some reasonable manner." *United States* v. *Correll*, 389 U.S.

299, 307 (1967). See also *Zenith Radio* v. *United States*, 437 U.S. at 450; Pet. 13-19. The contrary ruling of the Federal Circuit in this case conflicts with this established precedent and therefore warrants this Court's review.

Indeed, the decision of the court of appeals in this case conflicts even with the lesser standard of deference described by this Court in *Christensen* for agency opinions that are adopted in a format that Congress has *not* specifically authorized. The holding of the court below that "no deference" would be accorded to the agency's "binding rulings," and the court's refusal to consider or address the reasoning set forth in those rulings, cannot be reconciled with the holding in *Christensen* that even informally stated agency opinions are entitled to "some deference" (slip op. 10, quoting *Reno* v. *Koray*, 515 U.S. 50, 61 (1995)), are "entitled to respect" from the courts, and should therefore, at a bare minimum, be reviewed to determine if they have the "power to persuade" (slip op. 11, quoting *Skidmore* v. *Swift & Co.*, 323 U.S. at 140). In the present case, the Federal Circuit held that no consideration whatever should be given to the content or reasoning of the agency's binding rulings. See Pet. App. 7a; Pet. 11. Because the holding of the Federal Circuit in this case thus conflicts with *all* of the possible standards of deference that could apply under *Christensen* or under this Court's pertinent prior decisions, the Court may wish to consider summary reversal in this case.

2. a. Respondent suggests (Br. in Opp. 13-15) that the question whether deference is owed to the agency's binding rulings is not properly presented in this case because that question was raised by the court of appeals on its own motion following this Court's de-

cision in *United States* v. *Haggar Apparel Co.*, 526 U.S. 380 (1999), and was not initially raised or addressed by the parties. Since the question was in fact litigated by the parties and was in fact decided by the court of appeals in this case, it is unquestionably properly presented in the petition in this case. And, since the court of appeals has selected this case as its vehicle for resolving the question of the deference owed to the agency's classification rulings, and has in fact resolved that question in this case, this case is also the most suitable case for review of this issue by this Court.[2]

Respondent errs in stating that any claim of deference has been "waived" (Br. in Opp. 13) because, before the Federal Circuit's decision in *Haggar* was reversed by this Court, the government had not pressed for deference to the agency's rulings in this case. The United States plainly did not acquiesce in the no-deference standard applied in the Federal Circuit during the period that the government was challenging that standard in the *Haggar* case. And, following the issuance of this Court's decision upholding the government's position in *Haggar*, the question of deference as applied in the specific context of this case was briefed by the parties and decided by the court of appeals. The court of appeals did not regard the government's orderly presentation of the deference issue first to this Court in *Haggar* to represent a "waiver" of the deference question in the present case. To the contrary, the court of appeals understood that the question of deference relates to its judicial responsibility correctly to interpret and apply the laws and

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[2] The Federal Circuit denied the government's petition for rehearing *en banc* in this case, thus indicating that it will not reconsider this matter without the intervention of this Court.

therefore understood that it was necessary for that issue to be addressed and resolved based upon this Court's precedents, including the recent decision of this Court in *Haggar*. See Pet. App. 7a-8a.

b. Respondent is incorrect in asserting (Br. in Opp. 13-16) that the record in this case is inadequate for plenary review by this Court of the underlying question of statutory interpretation. This case was submitted to the trial court on cross-motions for summary judgment. There are no facts in dispute. The ultimate question of law that governs this case—the proper tariff classification that applies to respondent's imported articles—requires application to these facts of the controlling provisions of the Tariff Act and the relevant interpretations of those provisions in the binding rulings of the Customs Service. The record of this case is plainly sufficient for this purpose.

Respondent nonetheless suggests (Br. in Opp. 15) that the rulings on which the United States relies are irrelevant in this case because respondent has challenged *duties* imposed on its goods and has not brought a challenge to the rulings themselves. Respondent seemingly suggests that, because direct judicial review of the relevant agency rulings was not sought, those rulings have been made irrelevant in determining the proper application of the tariff classification provisions to respondent's goods. That proposition, for which respondent cites no authority, is obviously flawed.[3]

[3] Respondent asserts that *one* of the several agency classification rulings cited by the government in this case was not subject to direct attack when it was entered because the agency applied that ruling only prospectively and allowed the particular merchandise then at issue to enter duty free (Br. in Opp. 16). The present case, however, involves the application of such rulings to *different* shipments of goods to which the agency's binding rulings *have* been applied. Respondent may challenge the application of those rulings in this case regardless whether or not a direct challenge to each of the prior rulings would have been possible at the time it was first entered. The regulations expressly state that the agency's rulings may be cited as authority not only "with respect to the particular transaction" in connection with which they were issued but may also "be cited as authority in the disposition of transactions involving the same circumstances." 19 C.F.R. 177.9(a).

The determination of the correct meaning of federal statutes is often based upon deference to interpretive rulings adopted in connection with, and applied first to, individuals other than the party who disputes that interpretation in subsequent litigation. See, *e.g.*, *United States* v. *Correll*, 389 U.S. at 306 (applying an agency ruling adopted 27 years before the decision in that case). The failure of the court of appeals to follow that settled principle of deference in this case warrants review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

MAY 2000

(5)

Supreme Court, U.S.
FILED
MAY 15 2000
CLERK

No. 99-1434

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

THE MEAD CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

RESPONDENT'S SUPPLEMENTAL BRIEF

J. PETER COLL, JR.
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Counsel for Respondent

5 pp

STATEMENT PURSUANT TO RULE 29.6

The Mead Corporation has no parent company and there is no publicly held company which owns 10% or more of The Mead Corporation's stock.

INTRODUCTION

Mead submits this Supplemental Brief pursuant to Supreme Court Rule 15.8 for the purpose of clarifying the import of the Court's holding in *Christensen v. Harris County*, No. 98-1167, 2000 WL 504578 (U.S. May 1, 2000), which was handed down one business day after Mead had filed its Brief in Opposition to the Petition for a Writ of Certiorari. *Christensen* is a straightforward decision on judicial deference to administrative interpretations that endorses the Federal Circuit holding for which Petitioner has sought review, but Petitioner's mischaracterization of that decision in its Reply Brief ("Reply" or "Rep. Br.") compels the submission of this Supplemental Brief.

ARGUMENT

In *Christensen*, the Court addressed whether an opinion letter issued by the United States Department of Labor was entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Court held that it was not:

> Here . . . we confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters — like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law — do not warrant *Chevron*-style deference.

Christensen, 2000 WL 504578, at *6.

This holding speaks directly to the instant Petition. As established in Mead's Brief in Opposition ("Opp. Br."), the classification ruling for which Customs seeks *Chevron* deference was not "arrived at after . . . a formal adjudication or notice-and-comment rulemaking." *Id.* Like the opinion letter, policy statements, agency manuals and enforcement guidelines discussed in *Christensen*, Customs classifications rulings do not warrant *Chevron* deference.

Petitioner misstates the holding of *Christensen*, claiming that this Court found *Chevron* deference unwarranted because the Department of Labor opinion letter was "issued in a format . . . that Congress has not authorized for that purpose." Rep. Br. at 3 (quotations omitted). This interpretation of the Court's holding is inventive, but plainly wrong. There is no support in *Christensen* for the theory that the dispositive factor in denying *Chevron* deference is the *format* of the agency interpretation rather than the absence of "formal adjudication or notice-and-comment rulemaking." *Christensen*, 2000 WL 504578, at *6.

To the extent that Customs seeks support in *Christensen* for urging a lesser standard of deference than that specified in *Chevron*, this argument, too, misses the point. The Federal Circuit held below that Customs classification rulings were not entitled to *Chevron* deference; it did not address the availability of a lesser deference standard because Customs did not seek such deference. The consideration of a lesser standard, waived in the lower courts, cannot be raised initially before this Court. *See* Opp. Br. at 13-15.

Contrary to Petitioner's arguments, *Christensen* makes clear that *Chevron* deference is inappropriate for Customs classification rulings, and consequently supports the Federal Circuit's holding. In view of *Christensen*, it is respectfully submitted that the Federal Circuit's decision below should be summarily affirmed.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

SIDNEY H. KUFLIK
Counsel of Record
LAMB & LERCH
233 Broadway
51st Floor
New York, New York 10279
(212) 608-2700

J. PETER COLL, JR.
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666 Fifth Avenue
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Counsel for Respondent

Supreme Court, U.S.
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No. 99-1434

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

THE MEAD CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF *AMICUS CURIAE* OF THE CUSTOMS AND INTERNATIONAL TRADE BAR ASSOCIATION IN SUPPORT OF RESPONDENT'S OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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BRIEF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37.2(a) on written consent of all parties, the Customs and International Trade Bar Association (CITBA) respectfully submits this brief *amicus curiae* in support of respondent The Mead Corporation's (Mead) opposition to the United States of America's petition for a writ of certiorari.[1]

INTERESTS OF *AMICUS CURIAE*

CITBA, organized in 1919, is a national professional association of lawyers who practice customs and international trade law before federal courts and agencies with jurisdiction over such matters. This brief reflects the judgment of CITBA members reached in the exercise of their profession and is offered solely to assist in improving our legal system.

CITBA participated in this case as *amicus curiae* on appeal before the U.S. Court of Appeals for the Federal Circuit. CITBA also appeared as *amicus curiae* before this Court in 1998 in *United States v. Haggar Apparel Co.*, 526 U.S. 380; 119 S. Ct. 1392 (1999), a case presenting similar issues.

STATEMENT

At issue in this case is whether the courts must accord controlling-weight deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to ordinary Customs classification rulings.

The Customs classification rulings at issue, including HQ No. 953126, are brief, informal letter rulings, issued to one person, applying the law to a set of facts described in the

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[1] Pursuant to Rule 37.6, amicus states that no counsel for a party authored this brief in whole or in part. Further, no person or entity other than CITBA, its members, and its counsel made a monetary contribution to the preparation or submission of this brief.

ruling request. *See* 19 C.F.R. Part 177. The law applied is the Harmonized Tariff Schedule of the United States (HTSUS) and the issue is whether the scope of a particular tariff subheading encompasses a specific good. The purpose of classification rulings is to provide importers with a definitive statement regarding how their goods will be classified by Customs at the time of importation, and the duties that will be assessed thereon, so that importers may price their goods accordingly. Most classification rulings do not set forth detailed, reasoned expositions of the law on a particular matter. They may be issued by a variety of Customs officials at port locations and at the headquarters level, are not generally subject to notice-and-comment procedures,[2] and are not subject to direct judicial review absent a showing of irreparable harm. *See* 28 U.S.C. § 1581(h). Although Customs disseminates some rulings to the public through its web-site, Lexis and Westlaw, all rulings are not published reliably in an official government publication.

MISSTATEMENTS OF FACT OR LAW

I. PETITIONER'S CITATION TO CUSTOMS SERVICE RULING HQ NO. 955937 (OCT. 21, 1994) IS INCORRECT

Petitioner's contention that HQ No. 955937 is the Customs Service ruling that applies to the judgment of the court of appeals is incorrect. *See* Petition for a Writ of Certiorari 1; Pet. App. 28a-47a. The opinion of the U.S. Court of Appeals for the Federal Circuit makes clear that the "classification ruling" with which the court was concerned

[2] Although certain Customs classification rulings are subject to notice-and-comment procedures, *see* 19 U.S.C. § 1625 and 19 C.F.R. § 177.10(c), the court of appeals expressed no opinion on such rulings. *The Mead Corp. v. United States*, 185 F.3d, 1304, 1307 n.1; Pet. App. 6a.

was HQ No. 953126 (Jan. 11, 1993), App., *infra*, 1a-3a, not the decision on the application for further review of the protest included in the appendix to petitioner's brief.

In the first section of its opinion, the court of appeals states: "In a January 11, 1993 ruling, Customs classified the subject planners as bound diaries under subheading 4820.10.20 ..." *The Mead Corp. v. United States*, 185 F.3d 1304, 1305 (Fed. Cir. 1999); Pet. App. 2a. The court refers to this ruling as the "1993 ruling." *Mead*, 185 F.3d at 1306; Pet. App. 3a. The Customs decision on respondent's application for further review of its protest is dated October 21, 1994. The court's opinion deals with classification rulings, not protest decisions. *See Mead*,185 F.3d at 1307; Pet. App. 5a. The kinds of rulings with which the court of appeals was concerned is evident from the extensive references in its opinion to Part 177 of Title 19 of the Code of Federal Regulations, which deals with administrative rulings. Had the court been dealing with protest decisions, it would have referred to Part 174, which deals with administrative protests. *See* 19 C.F.R. § 174.23-174.27.

Incongruously, petitioner states that the ruling that applies to this case is a protest decision issued under 19 C.F.R. Part 174, and yet does not include the statutory (19 U.S.C. § 1514) or regulatory provisions (19 C.F.R. Part 174) relating to administrative protests in its list of "Statutory and Regulatory Provisions Involved." *See* Petitioner's Brief 2-4. The statutory and regulatory provisions cited by petitioner relate to Customs ruling HQ No. 953126 (Jan. 11, 1993), a letter ruling to the importer on the proper tariff classification of the imported goods at issue. Since the holding of the court of appeals relates to HQ No. 953126, petitioner's extensive description of the protest decision on pages 5-8 of its brief should be disregarded.

HQ 953126 is the administrative ruling Customs issued in 1993 after reviewing a sample of the goods respondent intended to import. Thereafter, respondent imported the "Personal Day Planners" using the tariff classification

indicated in HQ No. 953126 and protested the liquidation of the entries because it disagreed with the classification. HQ No. 955937 is the Customs decision on respondent's administrative protest of the entries at issue. It is not, however, the ruling that was the subject of the appellate court's judgment for which petitioner seeks review.

II. PETITIONER MISSTATED THE HOLDING OF THE COURT OF APPEALS

The court of appeals did not hold that "tariff classification rulings of the Customs Service are to be given no judicial deference, and are instead to be disregarded utterly in interpreting the customs provisions." Petitioner's Brief 4-5. Rather, the court held that "*Haggar*, and thus *Chevron* deference, does not extend to ordinary classification rulings." *Mead*, 185 F.3d at 1307; Pet. App. 5a. Moreover, the portion of the appellate court's opinion immediately preceding its holding reveals that by "*Chevron* deference," the court meant "controlling weight." *Mead*, 185 F.3d at 1306; Pet. App. 5a.

The entire context of the proceedings below and the opinion of the appellate court demonstrate that the court was concerned with the impact of this Court's decision in *Haggar* on ordinary classification rulings. By order dated May 27, 1999, the court of appeals instructed the parties to brief this question: "How, if at all, does the Supreme Court's decision in *United States v. Haggar Apparel Co.*, 119 S. Ct. 1392 (1999), affect this court's standard of review of classification rulings issued by the United States Customs Service?" App., *infra*, 4a. This was the question posed by the court of appeals and the question answered in its opinion of July 28, 1999.

Fairly read, the appellate court's statement that it gives no deference to standard Customs rulings simply means that it has not afforded them *Chevron* deference, *i.e.*, controlling weight. To say that the court of appeals held that classification rulings of the Customs Service are "to be

disregarded utterly in interpreting the customs provisions" misstates the holding of the court of appeals.

III. 19 U.S.C. § 1502(a) IS NOT AN EXPLICIT CONGRESSIONAL AUTHORIZATION FOR CUSTOMS TO ISSUE BINDING RULINGS WITH THE FORCE OF LAW

Petitioner's edited presentation of 19 U.S.C. § 1502(a) amounts to a misstatement of the law. Quoting 19 U.S.C. § 1502(a), petitioner states on page 14 of its brief:

> Congress has authorized the agency to adopt such "binding rulings prior to the entry of the merchandise" as may "be necessary to secure a just, impartial, and uniform appraisement of imported merchandise and the classification and assessment of duties thereon * * *."

In fact, 19 U.S.C. § 1502(a) provides that the Secretary of the Treasury shall

> establish such rules and regulations not inconsistent with the law ***(including regulations establishing procedures for the issuance of*** binding rulings prior to the entry of the merchandise concerned) and may ***disseminate such information*** as may be necessary to secure a just, impartial, and uniform appraisement of imported merchandise and the classification and assessment of duties thereon at the various ports of entry (emphasis added).

SUMMARY OF ARGUMENTS

The decision of the court of appeals in this case is consistent with previous decisions of this Court, including the Court's decision in *Haggar*. In *Haggar*, this Court held that the legal framework established in *Chevron* applies to Customs regulations promulgated in accordance with notice-and-comment procedures. *Haggar*, 526 U.S. at ___; 119 S.

Ct. at 1400. At issue in this case is whether *Chevron* "controlling weight" deference is to be accorded to ordinary decisions on tariff classification, as expressed in ruling letters issued to and binding on only one person.

This case does not present questions of exceptional importance to the planning of commercial transactions and to the administration of the customs laws. The judgment of the court of appeals is consistent with decades of practice with respect to the administrative classification rulings of the U.S. Customs Service. This practice permits an importer, at its discretion, to seek a tariff classification ruling from the U.S. Customs Service for specific goods the company imports. If the importer disagrees with the agency decision, it must import the goods using the tariff classification indicated in the ruling and protest the classification upon liquidation of the entry. If Customs denies the protest, the importer may seek judicial review in the Court of International Trade and the Court of Appeals for the Federal Circuit. This is the well-established and orderly process that the respondent followed in this case. It is a process that, for decades, has permitted importers to plan their commercial transactions and the U.S. Customs Service to rationally administer the customs laws.

Amicus curiae respectfully urges this Court to deny the petition for a writ of certiorari to the U.S. Court of Appeals for the Federal Circuit.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH THIS COURT'S DECISIONS IN *HAGGAR* AND *CHEVRON*, AS WELL AS OTHER SUPREME COURT PRECEDENT

Chevron and its progeny do not stand for deference to agency interpretations in any format, no matter how informal or summary. Rather, they stand for the proposition that courts should give controlling weight to an authoritative agency interpretation expressed in a given format if the agency can

reasonably be construed as exercising authority delegated by Congress. For this reason, *Chevron* deference is accorded only to the extent that the agency acts pursuant to Congressional authorization in a format that Congress intended to be binding on the courts.

Courts have uniformly held that in according controlling-weight *Chevron* deference to an agency interpretation of a statute, the threshold question is one of delegation. *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 649 (1990) ("A precondition to deference under Chevron is a congressional delegation of administrative authority"); *Bowen v. Georgetown U. Hospital*, 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress"). Thus, courts should accord an agency interpretation *Chevron* deference only if the agency uses the procedures prescribed by Congress to create an authoritative interpretation binding on the courts. That is, when faced with the question of whether to accord an agency interpretation the force of law, a court must determine "whether Congress intend[ed] the agency's interpretation to bind the courts[.] The touchstone in every case is whether Congress intended to delegate to the agency the power to interpret with the force of law in the particular format that was used." Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 Yale J. on Reg. 1, 30-31, 33 (1990) ("*Which Agency Interpretations?*").[3] This Court endorsed this approach in

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[3] Numerous courts have cited this article as a leading authority on the propriety of according interpretations *Chevron* deference. *See, e.g., Northwest Tissue Ctr. v. Oregon Tissue Bank*, 1 F.3d 522, 536 (7th Cir. 1993); *Nat'l Family Planning and Reproductive Health Ass'n., Inc. v. Sullivan*, 979 F.2d 227, 240 (D.C. Cir. 1992); *Lane v. U.S. Postal Serv.*, 964 F. Supp. 1435, 1437 (D. Nev. 1996); *Earth Island Inst. v. Brown*, 865 F. Supp. 1364, 1374 (N.D. Cal. 1994); *see also* Kenneth C. Davis, ADMINISTRATIVE LAW OF THE EIGHTIES 506 (1989 Supp.) ("[t]he crucial criterion is whether Congress has conferred on the agency a power to make law through rules; if the agency exercises such power, the resulting

Haggar, noting that deference to Customs regulations was warranted because "[v]alid regulations establish legal norms." *Haggar*, 360 U.S. at __; 119 S. Ct. at 1399.

Congress has not authorized Customs, either expressly or implicitly, to issue administrative classification rulings that have the force of law and bind the courts in civil actions brought by importers for a refund of duties paid. Whereas *Haggar* involved the express delegation to Customs in 19 U.S.C. § 1502(a) to issue regulations with the force of law, this case involves administrative classification rulings, for which there is no comparable delegation. While 19 U.S.C. § 1502(a) parenthetically mentions rulings issued by Customs, it contains neither an express nor implied delegation of authority to issue classification rulings that bind the courts. The parenthetical merely specifies a type of regulation that Congress has authorized Customs to promulgate, *i.e.*, "regulations establishing procedures" for issuing rulings, and it also authorizes Customs to disseminate information necessary to secure uniform classification and appraisement of imported goods.[4]

Regulations such as the one at issue in *Haggar* comply with the rulemaking requirements of section 553 of the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq*. This Court has recognized that an agency's compliance with notice-and-comment rulemaking requirements under the APA is solid justification for deferring to the resulting regulation. Customs regulations deserve *Chevron* deference "in light of

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rules . . . have the force of law. . . ; if Congress has not conferred such power. . . ; the reviewing court normally has authority to substitute its judgment for that of the agency. . .").

[4] Moreover, the legislative history of the prior 19 U.S.C. § 1624, which section addressed the issuance of rulings, confirms that Congress did not intend rulings to have the force of law. "A ruling letter is binding on Customs only with respect to the transaction it describes." S. Rep. No. 95-778 at 21 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2211, 2233. If Congress had intended Customs rulings to bind the courts, it would not have limited their binding effect in such a manner.

the fact that the agency utilized the notice-and-comment rulemaking process before issuing the regulations." *Haggar*, 360 U.S. at __, 119 S. Ct. at 491. Regulations issued after public debate and discourse represent a final, well-reasoned, authoritative agency interpretation.

In contrast, Customs does not intend for ordinary classification rulings to establish rules of general applicability and thus issues them without engaging in public discussion, debate or any on-the-record proceeding. The volume of classification rulings issued each month prevents Customs from providing an authoritative, well-reasoned exposition of its interpretation of the statute in each letter. Classification rulings may be issued by any of several levels of Customs officials, and may be modified or revoked at any time. *See* 19 C.F.R. § 177.9(d).

II. THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH THE TREATMENT ACCORDED TO REVENUE RULINGS OF THE INTERNAL REVENUE SERVICE

The decision of the court of appeals in this case ensures that Customs classification rulings do not receive greater deference by the courts than revenue rulings issued by the Internal Revenue Service (IRS). Customs' practice of interpreting the tariff schedule and issuing classification rulings is less formal than the practice of the IRS in interpreting the Internal Revenue Code and issuing revenue rulings and letter rulings. *Mead*, 185 F.3d at 1308; Pet. App. 7a. IRS revenue rulings are an official interpretation of the tax laws applied to a specific fact situation. They are published in the Internal Revenue Bulletin and in the Cumulative Bulletin. They are not, however, published in the Federal Register or the Code of Federal Regulations. Treas. Reg. 601.201(a)(6).

This Court has long concurred with the practice of according greater deference to IRS regulations than to IRS

revenue rulings. In *Commissioner v. Schleier*, 515 U.S. 323, 336 n.8 (1995), this Court noted that IRS "interpretive rulings do not have the force and effect of regulations." *See also Davis v. United States*, 495 U.S. 472, 484 (1990); *Rowen Cos, Inc. v. United States*, 452 U.S. 247, 261 n.17 (1981); *Bartels v. Birmingham*, 332 U.S. 126, 132 (1947); John F. Coverdale, *Court Review of Tax Regulations and Revenue Rulings in the Chevron Era*, 64 Geo. Washington L. Rev. 35, 83 (1995). Customs classification rulings are of lesser stature than IRS revenue rulings and accordingly the deference to which they are entitled should not be greater.

III. THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH DECADES OF JUDICIAL AND ADMINISTRATIVE PRACTICE

The decision of the court of appeals does not leave "importers and the Customs Service without effective guidance for a wide range of transactions." Petition for a Writ of Certiorari 22. Rather, it preserves the long-standing practice of treating the scope of tariff subheadings as matters of law to be determined in the first instance by the specialized courts created by Congress.

From the enactment of the first Customs Statute in 1789 until the present, customs classification decisions have not been accorded controlling-weight deference by the courts. *See, e.g., Two Hundred Chests of Tea*, 22 U.S. (9 Wheat.) 430 (1824) (Collector of Customs' classification of tea accorded no deference in seizure case); *Elliot v. Swartwout*, 35 U.S. 137, 151-53 (1836) (Collector of Customs' classification of imported shawls accorded no deference).

Customs has issued rulings on classification issues for approximately 150 years. *See, e.g.*, Treas. Ss. 4, Synopsis of Sundry Decisions of the Treasury Department, on the Construction of the Tariff, Navigation, and other Acts, During the Year ending December 31, 1868; Treas. Ss. 6707, Synopsis of Sundry Decisions of the Treasury Department, on the Construction of the Tariff, Navigation, and other Acts,

During the Year ending December 31, 1885; T.D. 20766, 1 Treas. Dec. 442 (1899). Historically, the courts have never accorded these classification rulings controlling weight as in *Chevron*.

Customs classification rulings, coupled with the decisions of the specialized courts charged with interpreting the tariff schedule, have provided both importers and the Customs Service with "effective guidance for a wide range of transactions" for almost 150 years.

A. The Current Practice with Respect to Customs Classification Rulings Provides Effective Guidance for Importers

Under current regulations, an importer seeking guidance regarding how its goods will be classified, and at what rate they will be dutiable, may request a classification ruling from Customs. 19 C.F.R. § 177.1(a), (c). Such a ruling is binding on the party requesting the ruling and on Customs personnel with respect to all prospective transactions involving the merchandise described in the ruling, unless the ruling is modified or revoked. 19 C.F.R. § 177.9. If the party requesting a ruling does not agree with Customs' classification, that party must import the merchandise using the classification determined by Customs and then protest the classification upon liquidation of the entry. 19 C.F.R. § 174.11. If the protest is denied, the party may seek judicial review of the classification decision in the Court of International Trade and the Court of Appeals for the Federal Circuit. 28 U.S.C. § 1581(a); 28 U.S.C. § 1295(a)(5).

This procedure has long permitted importers to plan their commercial transactions, while allowing Customs to rationally administer the customs laws. The decision of the court of appeals does not affect these procedures, the manner in which importers plan their commercial transactions, or the authority of Customs to require importers to enter their merchandise using the tariff subheading provided in a classification ruling.

B. Historically, Courts Have Not Accorded Controlling-Weight Deference to Customs Classification Rulings

Customs classification rulings have never been treated as binding the specialized courts created by Congress to adjudicate tariff classification disputes. In fact, the suggestion that such rulings are entitled to controlling weight under *Chevron* is of recent vintage, having only been raised in the Court of Appeals for the Federal Circuit in recent years. *See, e.g., Rollerblade, Inc. v. United States*, 112 F.3d 481, 483 (Fed Cir. 1997); *Universal Elecs. Inc. v. United States*, 112 F.3d 488, 491-93 (Fed Cir. 1997); *Goodman Mfg. v. United States*, 69 F.3d 505, 508 (Fed. Cir. 1995); *Crystal Clear Indus. v. United States*, 44 F.3d 1001, 1003 (Fed Cir. 1995).

Historically, courts reviewing Customs classification decisions have never accorded them controlling-weight deference as in *Chevron*. In discussing the weight to be accorded a classification decision made by Customs, the United States Customs Court in *Sunbeam Corp. v. United States*, 62 Cust. Ct. 434, 442, Cust. Dec. 3794 (1969), *aff'd*, 57 C.C.P.A. 97, C.A.D. 984, 425 F.2d 1274 (Cust. & Pat. App. 1970), stated:

> At any rate, although of some interest in ascertaining the Bureau's approach to classification of merchandise, this court will not be led or misled by a Bureau ruling; the final determination as to the tariff classification of imported merchandise in litigation has been reposed in this court by Congress, subject to appeal to the appropriate tribunal.

See also Venetianaire Corp. of Am. v. United States, 470 F. 2d 1047, 1049 (C.C.P.A. 1973); *Corp. Argentina de Productores de Carnes v. United States*, 32 C.C.P.A. 175, C.A.D. 304 (1945); *Sentora Hardware Dist. v. United States*, 59 Cust. Ct. 558, 565, Cust. Dec. 3227 (1967); *Borneo Sumatra Trading Co., Inc. v. United States*, 56 Cust. Ct. 166, 172-77, Cust. Dec. 2624 (1966).

The weight to be accorded Customs' classification decisions is rarely discussed in the reported court cases because of the recognized principle that the specialized courts created by Congress should reach an independent determination regarding the correct classification of imported merchandise. According controlling-weight deference to Customs classification rulings would fundamentally change the scope of review in tariff classification disputes, would produce the very uncertainty that petitioner argues has been created by the decision of the court of appeals, and would prevent meaningful judicial review of the agency's classification decisions.

C. The Judgment of the Court of Appeals Is Not "Anomalous"

Petitioner's contention that the judgment of the court of appeals creates an anomalous regime for Customs is belied by a close examination of the cases cited. None of the cases or the article by former Chief Judge Re cited on pages 22-23 of the petition deals directly with Customs classification rulings.

In *Zenith Radio Corp. v. United States*, 437 U.S. 443 (1978), a countervailing duty case, the issue was the weight to be accorded to a longstanding and consistent administrative practice of the Treasury Department on the treatment of certain taxes under the countervailing duty law. This Court accorded the administrative practice "considerable weight," not because it was first enunciated in a "ruling" by the Treasury Department, but because the statutory interpretation at issue had been adopted within one year of initial passage of the statute at issue, had been uniformly followed by the Department for over 80 years and because the statute had been reenacted by Congress five times without modification. *Zenith*, 437 U.S. at 457.

In *United States v. Vowell*, 9 U.S. (5 Cranch) 368 (1809), the issue was when duties became due. In *Guess? Inc. v. United States*, 944 F.2d 855 (1991), the issue was the proper interpretation of a drawback regulation. In *Generra Sportswear Co. v. United States*, 905 F.2d 377 (1990), the

issue before the court was the correct valuation of imported merchandise. In *Dal-Tile Corp. v. United States*, 829 F. Supp. 394 (1993), *aff'd* 26 F.3d 139 (Fed. Cir. 1994), the issue was when certain liquidations took place as a matter of law. Finally, nowhere in the article *Litigation Before the United States Court of International Trade* does former Chief Judge Re suggest that Customs classification rulings should be accorded controlling weight under *Chevron*. Hon. Edward D. Re, *Litigation Before the United States Court of International Trade*, 19 U.S.C.A. §§ 1-1300, Cum. Ann. Pocket Part, at XI (1998).

Mitsui Foods, Inc. v. United States, 867 F.2d 1401 (Fed. Cir 1989) dealt with a statutory interpretation by the National Marine Fisheries Service (NMFS). Although the plaintiff in *Mitsui* sought judicial review of Customs' liquidation of its entry under a particular tariff classification, the agency interpretation under attack was actually that of the NMFS.

At issue in *Mitsui Foods* was not the deference to be accorded to Customs' classification (which was strictly the ministerial act of classifying the tuna in an in-quota or out-of-quota provision, based on data reported by the NMFS) but rather the deference to be accorded to the NMFS's determination that the tariff term "United States pack of canned tuna" excluded tuna packed in American Samoa. The Court of International Trade reviewed the role of the NMFS in administering the tariff-rate quota, the purpose of the tariff-rate quota in protecting domestic industry, the reasonableness of the NMFS interpretation, and Congressional acquiescence in the agency interpretation. Based on its evaluation of these factors, the Court of International Trade determined that the NMFS interpretation was reasonable and should not be disturbed, and hence Customs' classification of the tuna was correct. *Mitsui Foods*, 688 F. Supp. 605, 609 (C.I.T. 1988). The court of appeals affirmed, adopting the reasoning of the trial court as its own. *Mitsui Foods*, 867 F.2d at 1403.

The decision in *Mitsui Foods* in no way suggests that Customs classification rulings are entitled to controlling-

weight deference under *Chevron*. The court of appeals' statement that "Customs interpretation of this language in item 112.30, TSUS, does not contravene any clearly discernible legislative intent and is 'sufficiently reasonable,'" *Mitsui Foods*, 867 F.2d at 140, and therefore is entitled to "substantial weight," is simply a reference to the way in which Mitsui raised the issue, *i.e.*, by protesting the liquidation of the customs entry of its tuna at the higher rate of duty. Moreover, there clearly was no Customs classification ruling under 19 C.F.R. Part 177 involved in *Mitsui Foods*. In any event, "substantial weight" is not the equivalent of "controlling weight."

IV. ADMINISTRATION OF THE TARIFF SCHEDULE DOES NOT IMPLICATE THE KIND OF POLICYMAKING AT ISSUE IN *CHEVRON*

This case does not implicate the kind of policymaking or statute at issue in *Chevron* and *Haggar* In issuing classification rulings, Customs does not resolve the competing interests of citizens but rather administers the tariff schedule with the objective of ensuring its uniform application at all ports of entry. "An ambiguous legal rule does not have a single 'right' meaning; there is a range of possible meanings; the selection from the range is an act of policymaking. The person who fleshes out the meaning of the rule is the true law-giver in the circumstances." *Homemakers N. Shore, Inc. v. Bowen*, 832 F.2d 408, 411 (7th Cir. 1987). In contrast, the scope of each subheading in the U.S. tariff schedule is definite. It is the intent of Congress that every good imported into the United States be classified in the single most appropriate tariff subheading, and that duty be assessed accordingly. Interpreting the terms of a tariff provision is the act of interpreting for a single best meaning, *see* Anthony, *Which Agency Interpretations?* at 34, and is best left to the specialized courts Congress created to administer the tariff schedule and to ensure its uniform application throughout the country. The Court of International Trade and the U.S. Court of Appeals for the Federal Circuit should arrive at an independent determination regarding the scope of a given tariff subheading .

V. THE SECOND QUESTION PRESENTED BY PETITIONER IS NOT PROPERLY BEFORE THIS COURT

Whether the Customs Service reasonably interpreted the statutory phrase "diaries, notebooks and address books, bound" in subheading 4820.10.20 of the Harmonized Tariff Schedule of the United States is not properly before this Court. The court of appeals determined that standard Customs classification rulings are not entitled to controlling weight under *Chevron*. For this reason, and since it based its decision on a traditional lexicographic analysis, the court of appeals never addressed whether Customs reasonably interpreted the statutory phrase. There is no judgment on this issue, and this Court should not address this matter in the first instance. Accordingly, this Court should deny the petition for a writ of certiorari on the second issue presented.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully asks this Court to deny the United States' petition for a writ of certiorari to the U.S. Court of Appeals for the Federal Circuit.

Respectfully submitted.

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DATE: May 1, 2000

APPENDIX

HQ NO. 953126 (JAN. 11, 1993)

Department of the Treasury
United States Customs Service

1993 U.S. Custom HQ Lexis 170: HQ 953126

January 11, 1993

DOCUMENT-NO: CLA-2 CO:R:C:T 953126 CAB

CATEGORY: Classification

TARIFF-NO: 4820.10.2010

O'Neill & Whitaker, Inc.
1809 Baltimore Avenue
Kansas City, MO 64108

REFERENCE: Modification of New York Ruling Letter (NYRL) 864206 dated June 19, 1991

Dear Mr. O'Neill:

The Area Director of Customs, New York, has requested that this office review NYRL 864206 dated June 19, 1991. Since the issuance of that ruling, our position on the classification of multi-function ring-binder books or daily planners has been modified. Accordingly, this ruling modifies NYRL 864206.

NYRL 864206 concerned the classification of a multi-function ring-binder book, referred to as a "Personal Planner". This "Personal Planner" was comprised of a calendar, a daily planner, an address book, a fold-out map, card holders, a ruler, and a notepad. In NYRL 864206, Customs concluded that the merchandise at issue was classifiable in subheading 4820.10.4000, HTSUSA, the duty-free provision for other (non-enumerated) articles similar to registers, account books,

notebooks, receipt books and diaries. Customs determined that the submitted sample, commercially referred to as a "daily planner", was considered a looseleaf book with multi-functions.

After further review, concerning the classification of daily planners or multi-function looseleaf binders, Customs has modified its position on the applicable classification. In Headquarters Ruling Letter (HRL) 089960 dated February 10, 1992, Customs ruled that multi-function looseleaf binders or daily planners are generally used for daily recordkeeping and are classifiable as diaries. HRL 089960 also makes a distinction regarding whether the merchandise at issue is bound and classifiable as a diary under subheading 4820.10.2010, HTSUSA, or not bound and classifiable as an article similar to a diary under subheading 4820.10.4000, HTSUSA. Accordingly, the "Personal Planner" is properly classifiable under subheading 4820.10.2010, HTSUSA. The rate of duty is 4 percent *ad valorem*.

In order to ensure uniformity in Customs classification of this merchandise and eliminate uncertainty, we are modifying NYRL 864206 to reflect the above classification effective with the date of this letter. However, if after your review, you disagree with the legal basis for our decision, we invite you to submit any arguments you might have with respect to this matter for our review. Any submission you wish to make should be received within thirty (30) days of the date of this letter.

This notice to you should be considered a modification of NYRL 864206 under 19 CFR 177.9(d)(1). It is not to be applied retroactively to NYRL 864206 (19 CFR 177.9(d)(2)) and will not, therefore, affect past transactions for the importation of your merchandise under that ruling. However, for the purposes of future transactions of merchandise of this type, NYRL 864206 will not be valid precedent. We recognize that pending transactions may be adversely affected by this modification, in that current contracts for importation arriving at a port subsequent to this decision will be classified

pursuant to it. If such a situation arises, you may, at your discretion, notify this office and apply for such relief from the binding effects as may be warranted by the circumstances. However, please be advised that in some instances involving import restraints, such relief may require separate approvals from other government agencies.

ISSUED-BY: John Durant, Director

CUSTOMS SERVICE DISCLAIMER: Inclusion of a Customs ruling in LEXIS does not constitute publication of the ruling under 19 CFR 177.10(b). An established and uniform practice is created for Customs rulings only by full-text publication in the Customs Bulletin and only if the ruling concerns a rate of duty or change.

NOTE: Pursuant to Fed. Cir. R. 47.6 this order
Is not citable as precedent. It is a public order.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

98-1569

THE MEAD CORPORATION, PLAINTIFF-APPELLANT

v.

UNITED STATES, DEFENDANT-APPELLEE

[Filed: May 27, 1999]

Before NEWMAN, RADER, and SCHALL, Circuit Judges.

ORDER

The parties shall file supplemental briefs, not to exceed 20 pages in length, on or before June 28, 1999.

Only the following question is to be addressed in the briefs:

How, if at all, does the Supreme Court's decision in United States v. Haggar Apparel Co., 119 S. Ct. 1392 (1999), affect this court's standard of review of classification rulings issued by the United States Customs Service?

FOR THE COURT,

/s/ JAN HORBALY
Jan Horbaly
Clerk

cc: Amy M. Rubin, Esq.
Sidney H. Kuflik, Esq.

Supreme Court, U.S.
FILED
JUL 14 2000

No. 99-1434

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

THE MEAD CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether classification rulings issued by the Customs Service are entitled to deference in determining the proper tariff classification of imported goods.

2. Whether the Customs Service reasonably interpreted the statutory phrase "diaries, notebooks and address books, bound" in Subheading 4820.10.20 of the Harmonized Tariff Schedule of the United States to include the spiral-bound and ring-bound day planners imported by respondent.

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In the Supreme Court of the United States

No. 99-1434

UNITED STATES OF AMERICA, PETITIONER

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THE MEAD CORPORATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 185 F.3d 1304. The opinion of the Court of International Trade (Pet. App. 19a-27a) is reported at 17 F. Supp. 2d 1004. The Customs Service ruling (Pet. App. 28a-47a) that applies to this case is cited as HQ No. 955937 and is reported unofficially at 1994 WL 712863 (Customs).

JURISDICTION

The judgment of the court of appeals was entered on July 28, 1999. A petition for rehearing was denied on November 1, 1999 (Pet. App. 17a). On January 19, 2000, the Chief Justice extended the time for filing a petition for a writ of certiorari to March 1, 2000. The petition

for a writ of certiorari was filed on February 29, 2000, and was granted on May 30, 2000. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. General Note 20 of the Harmonized Tariff Schedules of the United States, 19 U.S.C. 1202 (Supp. I 1995), provides in relevant part:

> The Secretary of the Treasury is hereby authorized to issue rules and regulations governing the admission of articles under the provisions of the tariff schedules. * * *

2. 19 U.S.C. 1502(a) provides in relevant part:

> The Secretary of the Treasury shall establish and promulgate such rules and regulations not inconsistent with the law (including regulations establishing procedures for the issuance of binding rulings prior to the entry of the merchandise concerned), and may disseminate such information as may be necessary to secure a just, impartial, and uniform appraisement of imported merchandise and the classification and assessment of duties thereon at the various ports of entry. * * *

3. 19 U.S.C. 66 provides in relevant part:

> The Secretary of the Treasury shall prescribe forms of entries, oaths, bonds, and other papers, and rules and regulations not inconsistent with law, to be used in carrying out the provisions of law relating to raising revenue from imports, or to duties on imports * * * and shall give such directions to customs officers and prescribe such rules and forms

> to be observed by them as may be necessary for the proper execution of the law.

4. 19 U.S.C. 1624 provides:

> In addition to the specific powers conferred by this chapter the Secretary of the Treasury is authorized to make such rules and regulations as may be necessary to carry out the provisions of this chapter.

5. 19 U.S.C. 1625 provides in relevant part:

> (a) Within 90 days after the date of issuance of any interpretive ruling (including any ruling letter, or internal advice memorandum) or protest review decision under this chapter with respect to any customs transaction, the Secretary shall have such ruling or decision published in the Customs Bulletin or shall otherwise make such ruling or decision available for public inspection.
>
> * * * * *
>
> (c) A proposed interpretive ruling or decision which would—
>
> > (1) modify (other than to correct a clerical error) or revoke a prior interpretive ruling or decision which has been in effect for at least 60 days; or
> >
> > (2) have the effect of modifying the treatment previously accorded by the Customs Service to substantially identical transactions;
>
> shall be published in the Customs Bulletin. The Secretary shall give interested parties an opportunity to submit, during not less than the 30-day

period after the date of such publication, comments on the correctness of the proposed ruling or decision. After consideration of any comments received, the Secretary shall publish a final ruling or decision in the Customs Bulletin within 30 days after the closing of the comment period. The final ruling or decision shall become effective 60 days after the date of its publication.

6. For the period that this case involves, Subheading 4820.10.20 of the Harmonized Tariff Schedules of the United States, 19 U.S.C. 1202 (Supp. I 1995), provides a rate of duty of 3.2% for:

Diaries, notebooks and address books, bound; memorandum pads, letter pads and similar articles * * *.

7. 19 C.F.R. 177.9(a) provides in relevant part:

Effect of ruling letters generally. A ruling letter issued by the Customs Service under the provisions of this part represents the official position of the Customs Service with respect to the particular transaction or issue described therein and is binding on all Customs Service personnel in accordance with the provisions of this section until modified or revoked. In the absence of a change of practice or other modification or revocation which affects the principle of the ruling set forth in the ruling letter, that principle may be cited as authority in the disposition of transactions involving the same circumstances. Generally, a ruling letter is effective on the date it is issued and may be applied to all entries which are unliquidated, or other transactions with respect to which the Customs Service has not taken final action on that date. * * *

8. 19 C.F.R. 177.10 provides in relevant part:

(a) *Generally.* Within 120 days after issuing any precedential decision under the Tariff Act of 1930, as amended, relating to any Customs transaction (prospective, current, or completed), the Customs Service shall publish the decision in the Customs Bulletin or otherwise make it available for public inspection. For purposes of this paragraph a precedential decision includes any ruling letter, internal advice memorandum, or protest review decision. * * *

* * * * *

(c) *Changes of practice or position.*

(1) Before the publication of a ruling which has the effect of changing a practice and which results in the assessment of a higher rate of duty, notice that the practice (or prior ruling on which the practice is based) is under review will be published in the Federal Register and interested parties given an opportunity to make written submissions with respect to the correctness of the contemplated change. This procedure will also be followed when the contemplated change of practice will result in the assessment of a lower rate of duty and the Headquarters Office determines that the matter is of sufficient importance to involve the interests of domestic industry.

STATEMENT

This case concerns whether judicial deference is owed to the tariff classification rulings issued by the Customs Service under 19 U.S.C. 1502(a). That statute

authorizes the Secretary of the Treasury to adopt "rules and regulations" providing for the issuance of such "binding rulings prior to the entry of the merchandise" as may "be necessary to secure a just, impartial, and uniform appraisement of imported merchandise and the classification and assessment of duties thereon * * * ." 19 U.S.C. 1502(a). Pursuant to that authority, the Secretary has provided for the issuance of tariff classification rulings by the Customs Service which are "binding on all Customs Service personnel" and which, "[i]n the absence of a change of practice or other modification or revocation which affects the principle of the ruling set forth in the ruling letter * * * may be cited as authority in the disposition of transactions involving the same circumstances." 19 C.F.R. 177.9(a). In addition, the Customs Service is authorized to issue classification rulings in connection with specific merchandise already imported, 19 C.F.R. 177.11(a), and to rule on protests from customs classification determinations, 19 U.S.C. 1515(a). The classification determinations set forth in such rulings and protest review decisions are also "precedential" in effect. 19 C.F.R. 177.10(a).[1]

[1] All "binding rulings" and other "precedential" actions of the Customs Service are published in the Customs Bulletin or otherwise made available for public inspection "[w]ithin 120 days after" they are issued. 19 C.F.R. 177.10(a). If a proposed ruling would have the "effect of changing a practice and * * * result[] in the assessment of a higher rate of duty," notice of the proposed change of practice is to "be published in the Federal Register and interested parties given an opportunity to make written submissions with respect to the correctness of the contemplated change." 19 C.F.R. 177.10(c). See also 19 U.S.C. 1625(c). Such notice and opportunity for comment is also afforded when the contemplated change would "result in the assessment of a lower rate of duty and the Headquarters Office determines that the matter is of sufficient importance to involve the interests of domestic industry." 19 C.F.R. 177.10(c).

In the present case, the Federal Circuit held that these tariff classification rulings of the Customs Service are to be given no judicial deference, and are instead to be disregarded utterly in interpreting the customs provisions. Pet. App. 6a-7a. Having elected to disregard the agency's interpretive "binding rulings," the court then concluded that the particular items imported by respondent were subject to no duty under the provisions of the Tariff Act involved in this case. That holding is incorrect and the judgment of the court of appeals should be reversed.

1. Respondent imports "daily planners," which are "loose-leaf books containing calendars, room for daily notes, telephone numbers, addresses and notepads. This sort of product originated in England and is probably best known under the trademark of Filofax." Pet. App. 19a. Under Subheading 4820.10.20 of the Harmonized Tariff Schedule of the United States (HTSUS), 19 U.S.C. 1202 (Supp. I 1995), if such items are properly classified as "bound" "diaries," they are subject to an import duty of 3.2% of their value.[2] If, however, these items are not "bound" or are not "diaries," they would then fall under Subheading 4820.10.40 of the HTSUS as "[o]ther" items for which no duty applies. Pet. App. 20a-21a, 24a.

In 1993, when respondent imported its daily planners into the United States, they were classified as "bound" "diaries" to which the 3.2% duty then applied. Respon-

[2] The rate of duty on these items has been reduced since this case arose. For importations occurring after 1998, the rate was reduced to 1.6% of value. HTSUS Subheading 4820.10.20, 19 U.S.C. 1202 (Supp. IV 1998).

dent filed an administrative protest of that classification. On October 21, 1994, the Customs Service issued a detailed denial of that protest in Headquarters Ruling Letter (HQ) No. 955937, 1994 WL 712863 (Customs). Pet. App. 28a-47a. That ruling noted that the issue presented by respondent "has been addressed in several rulings by this office" (*id.* at 31a-32a, citing, *e.g.*, Headquarters Ruling Letters (HRL) Nos. 955636, 1994 WL 220733 (Customs Apr. 6, 1994) and 955637, 1994 WL 220734 (Customs Apr. 6, 1994)):

> In these rulings this office has consistently determined that articles similar in design and/or function to the instant merchandise are classifiable as diaries. The rationale for this determination was based on lexicographic sources, as well as extrinsic evidence of how these types of articles are treated in the trade and commerce of the United States.

The agency noted that the text of Subheading 4820.10, "the common dictionary definition of 'diary', and past Customs rulings" all reflect that such daily planners are properly "classifiable as a bound diary." Pet. App. 32a. See note 1, *supra*.

The Customs Service explained that the daily planners imported by respondent "fit squarely" within one of the definitions of the word "diary" contained in the *Oxford English Dictionary*—as "[a] book prepared for keeping a daily record, or having spaces with printed dates for daily memoranda and jottings." Pet. App. 32a-33a. The Service rejected respondent's assertion that the agency should base its classification of such merchandise solely on the first enumerated definition of "diary" in one dictionary as "[a] daily record of events or transactions, a journal." *Id.* at 33a. The agency explained that "[m]any words have several definitions

and Customs may consider any or all of them when making a classification determination." *Ibid.* The agency concluded that the broader definition of the term "diary" adopted in its rulings "reflects the common and commercial identity of these items in the marketplace"—a fact evidenced by the common usage of the term "desk diary" to describe the imported merchandise. *Id.* at 34a.

Noting that customs provisions commonly incorporate prevailing commercial usages, the agency concluded that "there are many forms of 'diaries'" and that "the determinative criteria as to whether these types of articles are deemed 'diaries' for classification purposes is whether they are primarily designed for use as, or primarily function as, articles for the receipt of daily notations, events and appointments." Pet. App. 39a-40a. Since the daily planners imported by respondent are designed for those exact functions, the agency concluded that they constitute "diaries" within the meaning of HTSUS 4820.10.20. *Id.* at 34a, 43a.

The Customs Service further concluded that the daily planners imported by respondent are "bound" within the meaning of the statutory classification provision. Pet. App. 44a-47a. The agency emphasized that, in determining what constitutes a "bound" "diary," the traditional elements of formal "bookbinding" are not applicable. "The issue is not what constitutes a bound book, and there is no requirement that a diary be in the format of a book." *Id.* at 44a. Instead, the agency noted that the official explanation of the term "bound" in the notes of the Harmonized System Committee—the international authority that had drafted the terminology employed in this customs provision—states that the term "bound" includes "reinforcements or fittings of metal, plastics, etc." *Id.* at 45a. The Customs Service

noted that the explanation of the Harmonized System Committee "represent[s] the official interpretation of the [Harmonized Tariff System] at the international level" and that the Committee's explanation of "this language [is] indicative of the drafters' intent to include as bound any articles possessing ring binders or spiral binders." *Ibid.* The agency thus concluded that, "whether a ring binder or spiral" binder is used, "[p]ages held together in this manner" are "bound" for the purposes of this customs provision. *Id.* at 46a.

Since respondent's daily planners are bound in this very manner, the Customs Service ruled that these articles are "bound" "diaries" to which the 3.2% duty applied under HTSUS 4820.10.20. Pet. App. 46a-47a.

2. Six months after this ruling was issued, respondent again imported additional articles of the same type. When the agency again ruled that these daily planners are subject to duty as "bound" "diaries," respondent then raised exactly the same protest that the agency had just reviewed and rejected in HQ No. 955937. When that protest was again denied by the agency, respondent brought this action in the United States Court of International Trade to seek review of the agency's classification determination. Pet. App. 19a.

3. The Court of International Trade has exclusive jurisdiction to review the denial of a protest from a Customs Service classification decision. 28 U.S.C. 1581(a). On cross-motions for summary judgment, the court upheld the agency's determination in this case.

The court noted that respondent's daily planners were "designed for notations concerning the full range of daily experience" and that any "supplementary material" they contain does not alter their primary character as business diaries. Pet. App. 25a. The court

explained that its prior decisions in *Fred Baumgarten* v. *United States*, 49 Cust. Ct. 275 (1962), and *Brooks Bros.* v. *United States*, 68 Cust. Ct. 91 (1972), indicate that when, as here, "the diary portion was the essential or indispensable part of the importation," that is "controlling of its classification." Pet. App. 22a. The court noted that the current "tariff language" in the HSTUS was "adopted with knowledge of these judicial precedents." *Id.* at 23a (citing *Central Prods. Co.* v. *United States*, 936 F. Supp. 1002, 1006-1007 (Ct. Int'l Trade 1996)).[3]

The court also upheld the conclusion of the Customs Service that respondent's diaries were "bound" for purposes of HTSUS 4820.10.20. The court explained that "[t]he common meaning of 'bound' is fastened. The irrevocability of the fastening is not important so long as it goes beyond the transitory role of packaging." Pet. App. 26a.

4. The Federal Circuit has exclusive jurisdiction to review decisions of the Court of International Trade. 28 U.S.C. 1295(a)(5). On appeal from the decision in this case, the Federal Circuit reversed. Pet. App. 1a-16a.

a. The court of appeals first addressed whether it would afford deference to the classification rulings of

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[3] The Court of International Trade did not cite or rely upon the Headquarters Rulings (HQ No. 955937 and HRL Nos. 955636 & 955637) that the Customs Service issued to respondent in resolving this same issue in 1994. See page 8, *supra*. The court did, however, find support for its interpretation in a different Customs Service ruling, HQ No. 955199, 1994 WL 85353 (Customs Jan. 24, 1994), in which the agency explained the distinction between items that are "similar" to diaries (for which a duty applies) and "other" items (for which no duty is applicable). Pet. App. 24a ("The rationale used in that ruling is persuasive * * * .").

the Customs Service in determining the proper "meaning and scope of the tariff terms." Pet. App. 4a. The court noted that, in *United States* v. *Haggar Apparel Co.*, 526 U.S. 380, 391 (1999), this Court held that (Pet. App. 5a):

> if an HTSUS provision is ambiguous and Customs promulgates a regulation that "fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design," courts should give that judgment "controlling weight" as articulated in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 [1984].

The Federal Circuit reasoned, however, "that *Haggar*, and thus *Chevron* deference, does not extend to ordinary classification rulings [of the Customs Service]." *Ibid.* The court stated that deference is inappropriate for tariff classification rulings because those rulings are issued without the benefit of public comment, "do not carry the force of law and are not, like regulations, intended to clarify the rights and obligations of importers beyond the specific case under review."[4] *Id.* at 6a. The court stated that the "significant differences between Customs regulations and Customs rulings convince this court that *Haggar's* reach does not extend to standard Customs rulings." *Id.* at 6a-7a.[5] The court

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[4] In so stating, the court of appeals failed to consider or address the express language of the regulations which makes such rulings "binding on all Customs Service personnel" and which specifies that "the principle" of the rulings "may be cited as authority in the disposition of transactions involving the same circumstances." 19 C.F.R. 177.9(a). See also 19 C.F.R. 177.10(a) (protest review decisions are "precedential").

[5] The court compared Customs Service classification rulings to IRS interpretive rulings, which the court stated have no "binding effect" on the courts. Pet. App. 7a. Although an interpretive ruling is not "binding" in the sense that it is a part of the positive law that applies in courts, it is well established that courts are to defer to Treasury rulings that represent a "reasonable" elaboration of the statute. See *United States* v. *Correll*, 389 U.S. 299, 306-307 (1967); pages 24-27, *infra*.

of appeals concluded that it would therefore "continue[] to adhere to its [pre-*Haggar*] precedent giving no deference to such rulings." *Id.* at 7a (citing *Rollerblade, Inc.* v. *United States*, 112 F.3d 481, 484 (Fed. Cir. 1997)).[6]

b. Having thus chosen simply to disregard the interpretive classification rulings of the Customs Service, the Federal Circuit found it unnecessary to address or consider the detailed reasoning adopted by the Customs Service in issuing the Headquarters Rulings that apply to the facts of this case. See pages 7-10, *supra*. The court instead looked primarily to what it regarded as an appropriate dictionary definition of the term "diary" in the *Oxford English Dictionary* and concluded that, to be a "diary," an item of merchandise must have "relatively extensive" space for the recording not only "of the events themselves, but also a person's observations, thoughts, or feelings about them." Pet. App. 12a. Giving no weight to the common commercial use of the term "diary," the court expressed the view that a daily planner that contains "a place to jot down the date and time" of future appointments

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[6] Under Customs Service regulations, a new interpretation that would increase the duty from that applicable under a prior interpretation may not be adopted without prior Federal Register notice and opportunity for public comment. 19 C.F.R. 177.10(c); see note 1, *supra*. The court of appeals reserved the question whether such revocation decisions would be entitled to deference under *Chevron*. Pet. App. 6a n.1.

cannot qualify as a "diary" because the very essence of a "diary" is to be "retrospective, not prospective." *Id.* at 12a-13a.

Applying "the above principles," the court concluded that respondent's daily planners are not "diaries" within the meaning of HTSUS Subheading 4820.10.20 because (i) "the space provided" in those planners "would not permit a diarist to record relatively extensive notations about events, observations, feelings, or thoughts" and, (ii) while "[t]hese pages facilitate advance planning and scheduling[,] * * * a diary is not for planning." Pet. App. 13a-14a.

c. The court of appeals further concluded that respondent's daily planners are not "bound" within the meaning of the HTSUS 4208.10.20. To determine the meaning of this customs provision, the court looked to a book publishing industry definition of a "bound book" as a book that is "sewn, glued, or stapled into permanent bindings." Pet. App. 15a. The court stated that a diary may be considered as "bound" under this book publishing definition only if a "permanent" binding has been employed. *Ibid.* Because respondent's product is "contained in ringed loose-leaf binders" that lack the "permanent" character of a "bound book," the court held that these items are not "bound" within the meaning of the tariff provision. *Id.* at 15a-16a.

In reaching that conclusion, the court of appeals did not address the reasoning of the applicable Headquarters Rulings or of the authorities cited therein. In particular, the court of appeals did not acknowledge or discuss the official interpretive statements of the Harmonized System Committee (which drafted these tariff provisions) which explain that the term "bound" "diaries" as used in HTSUS 4820.10.20 includes diaries

that are bound with metal or plastic fittings, such as rings or spirals. See Pet. App. 45a; page 10, *supra*.

d. The court of appeals held that, since respondent's daily planners are similar to, but are not, "bound" "diaries" within the meaning of this tariff provision, they are to be "classified under the 'other' subheading of [HTSUS] 4820.10.40," for which no duty applies. Pet. App. 16a. The United States filed a timely petition for rehearing with suggestion for rehearing en banc. A response to the petition was requested by the court from respondent. The court thereafter denied the petition without a published vote. *Id.* at 17a.

SUMMARY OF ARGUMENT

I. The court of appeals erred in refusing to afford any deference to the formal "binding ruling" of the Customs Service adopted to apply and enforce the customs laws pursuant to 19 U.S.C. 1502(a). Decisions of this Court affording broad deference to the views of the federal officials who administer tariff legislation date to the very beginning of the Republic. *United States* v. *Vowell*, 9 U.S. (5 Cranch) 368, 372 (1809). This Court has long held that the agency's formal interpretations of the customs provisions—whether announced in an interpretive ruling or in a regulation—are to be sustained if they reflect a "reasonable" elaboration of the statutory scheme. *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978) (interpretive rulings); *United States* v. *Haggar Apparel Co.*, 526 U.S. 380, 391 (1999) (interpretive regulations).

The conclusion of the court of appeals that deference is due only to "regulations" and not to "rulings" of the Customs Service (Pet. App. 6a-7a) is thus plainly in error. When, as here, Congress has expressly authorized an agency to adopt "such rules and regulations

* * * as may be necessary" for the implementation and enforcement of a statutory scheme (19 U.S.C. 1502(a)), this Court has made clear that the agency's interpretive rulings are "dispositive" "[u]nless demonstrably irrational." *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 565 (1980). Indeed, this Court has long held that the similar interpretive rulings of the Treasury that implement and enforce the revenue laws must be sustained when "reasonable" because "Congress has delegated to the Commissioner, not to the courts, the task of prescribing 'all needful rules and regulations for the enforcement' of the Internal Revenue Code." *United States* v. *Correll*, 389 U.S. 299, 306-307 (1967) (quoting 26 U.S.C. 7805(a)).

This is not a case like *Christensen* v. *Harris County*, 120 S. Ct. 1655 (2000), in which the Court recently concluded that a lesser standard of deference applies to an agency opinion issued in an informal format that "Congress has not authorized for that purpose." 1 Kenneth C. Davis & Richard J. Pierce, *Administrative Law Treatise* § 3.5, at 120 (3d ed. 1994), cited with approval at 120 S. Ct. at 1663. In the present case, the format selected by the agency—the formal adoption and issuance of binding interpretive rulings—is precisely the format authorized by Congress for this purpose. Affording deference to the agency's formal interpretations which are adopted in the precise manner that Congress has directed is necessary to "honor that congressional choice." *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. at 568.

The holding of the court of appeals that "no deference" would be accorded to the agency's "binding rulings," and the court's refusal to consider or address the reasoning set forth in those rulings, also cannot be reconciled with the holding in *Christensen* that even

informally stated agency opinions would be entitled to "some deference" and "respect" and should, at a bare minimum, be reviewed to determine if they have the "power to persuade." 120 S. Ct. at 1663 (quoting *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944)). Even under the *Skidmore* standard, the court of appeals erred in flatly stating that the agency's "binding ruling" was entitled to "no deference" in this case.

II. Under the proper standard of deference that applies to agency interpretations of the "statutes that they are charged with administering" (*Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 739 (1996)), the Customs Service classification ruling should have been sustained in this case. The tariff classification issue in this case requires interpretation of two terms in Subheading 4820.10.10 of the HTSUS—"diaries" and "bound." In numerous rulings, the agency has "consistently determined that articles similar in design and/or function to the instant merchandise are classifiable as diaries." Pet. App. 31a. In rejecting the narrowly selected definitions offered by respondent, the Service has explained that business "diaries" are a recognized commercial product and that the "broader concept of diary" applied in the agency's rulings not only "reflects the common and commercial identity of these items in the marketplace" but is also supported by dictionary sources. *Id.* at 34a.

The Customs Service has also properly concluded that these daily planners are "bound" for purposes of HTSUS 4820.10.20. The Service relied on the Harmonized Commodity Description and Coding System Explanatory Notes—"which represent the official interpretation of the HTS at the international level"—which state that such goods may be regarded as "bound" if they "have reinforcements or fittings of

metal, plastics, etc." Pet. App. 45a. This official explanation makes it "clear that the Harmonized System Committee contemplated metal binders as being within this headings's definition of bound articles." *Ibid.* Because the day planners imported by respondent are bound in precisely this manner, the agency properly concluded that these products represent "bound" "diaries" to which the tariff of HTSUS 4820.10.20 applies.

The agency's well-formulated analysis of this classification provision constitutes a "reasonable" interpretation of the statute. The court of appeals erred by simply displacing the agency's reasonable interpretation with another, perhaps plausible, interpretation of its own. The question in cases of this type is not whether the agency's interpretation is the *only* reasonable choice. When, as here, the agency's interpretation "defines a term in a way that is reasonable in light of the legislature's revealed design," the agency's judgment is to be given "controlling weight." *Nationsbank of North Carolina, N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995).

ARGUMENT

I. THE CLASSIFICATION RULINGS ISSUED BY THE CUSTOMS SERVICE ARE ENTITLED TO DEFERENCE FROM THE COURTS IN DETERMINING THE PROPER TARIFF CLASSIFICATION OF IMPORTED GOODS

1. It has long been a bedrock legal principle that courts are to accord deference to the formal interpretations of a statute adopted by the agency that has been "charged with responsibility for administering the provision" by Congress. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984). See, *e.g.*, *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 739 (1996) ("It is our practice to defer to the reasonable judgments of agencies with regard to the meaning of ambiguous terms in statutes that they are charged with administering."); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *McLaren* v. *Fleischer*, 256 U.S. 477, 481 (1921); *Brown* v. *United States*, 113 U.S. 568, 570-571 (1885); *Edwards's Lessee* v. *Darby*, 25 U.S. (12 Wheat.) 206, 209-210 (1827). The deference that this Court has consistently accorded to formal agency interpretations of the statutes they administer in decisions such as *Chevron* is fully applicable here.

Congress has authorized the agency to adopt such "binding rulings prior to the entry of the merchandise" as may "be necessary to secure a just, impartial, and uniform appraisement of imported merchandise and the classification and assessment of duties thereon." 19 U.S.C. 1502(a). Congress has further specified that, under the "rules and regulations prescribed by the Secretary," the Customs Service is to determine "the

final appraisement of merchandise" and "fix the final classification and rate of duty applicable to such merchandise," 19 U.S.C. 1500(a),(b), and is then to issue decisions on any protests from such classification determinations, 19 U.S.C. 1515(a). "In addition to the specific powers" conferred on the agency under these provisions, Congress further broadly empowered the agency "to make such rules and regulations as may be necessary to carry out the provisions" of the Tariff Act. 19 U.S.C. 1624. See also 19 U.S.C. 66. In view of these broad delegations of authority, Congress emphasized in enacting the Harmonized Tariff Schedule of the United States in 1988 that "[t]he Customs Service will be responsible for interpreting and applying" this statute. H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 549-550 (1988).

The reasoning of *Chevron* thus applies directly here. Courts are to defer to the agency's reasonable interpretation of the statute it administers because of the "presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. at 740-741.

2. Decisions of this Court affording such broad deference to the views of the federal officials who administer tariff legislation date to the very beginning of the customs laws and are thus as old as the Republic itself. *United States* v. *Vowell*, 9 U.S. (5 Cranch) 368, 372 (1809), cited in *United States* v. *Haggar Apparel Co.*, 526 U.S. 380, 392 (1999). The Court has long made clear that the agency's formal interpretations of the customs provisions—whether announced in an

interpretive ruling or in a regulation—are to be sustained if they reflect a "reasonable" elaboration of the statutory scheme. *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978) (giving deference to interpretive rulings contained in Treasury Decisions); *United States* v. *Haggar Apparel Co.*, 526 U.S. at 391 (giving deference to interpretive regulations).[7] Affording such deference to agency interpretations of the detailed customs laws is required to ensure that this complex statutory scheme "is applied in a consistent and proper manner." *Id.* at 392. See also note 11, *infra*.

Until quite recently, the Federal Circuit had consistently applied this Court's longstanding precedent to give deference to the interpretive rulings and regulations formally adopted by the Customs Service under the Tariff Act. See, *e.g.*, *Guess? Inc.* v. *United States*, 944 F.2d 855, 858 (Fed. Cir. 1991); *Generra Sportswear Co.* v. *United States*, 905 F.2d 377, 379 (Fed. Cir. 1990); *Mitsui Foods, Inc.* v. *United States*, 867 F.2d 1401, 1403 & n.3 (Fed. Cir. 1989). The Court of International Trade had similarly acknowledged that it must "defer to the agency's interpretation of the statute" if it is "sufficiently reasonable," regardless whether "the court might have reached a different result on its own" (Chief Judge Edward D. Re., *Litigation Before the United States Court of International Trade*, 19 U.S.C.A. §§ 1-1300, at XLI (West Supp. 1998)). See *DAL-Tile Corp.*

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[7] Under this standard, the court "need not find that [the agency's] construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." *Udall* v. *Tallman*, 380 U.S. at 16 (quoting *Unemployment Comm'n* v. *Aragon*, 329 U.S. 143, 153 (1946)). See also *McLaren* v. *Fleischer*, 256 U.S. at 480- 481 ("If not the only reasonable construction of the act, it is at least an admissible one.").

v. *United States*, 829 F. Supp. 394 (Ct. Int'l Trade 1993), aff'd, 26 F.3d 139 (Fed. Cir. 1994); note 7, *supra*.

3. The Federal Circuit has recently refused, however, to apply these principles of judicial deference to cases involving the collection of customs duties. In a line of decisions that began in dicta in *Crystal Clear Industries* v. *United States*, 44 F.3d 1001, 1003* (Fed. Cir. 1995), and culminated in *Rollerblade, Inc.* v. *United States*, 112 F.3d 481, 484 (Fed. Cir. 1997), the Federal Circuit held that it would give no deference whatever to the agency's interpretations of the customs laws.[8] In *United States* v. *Haggar Apparel Co.*, 526 U.S. at 391-392, however, this Court unanimously rejected those recent decisions and held that, when "the agency's statutory interpretation 'fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design, we give [that] judgment "controlling weight."'" *Id.* at 392 (quoting *NationsBank of North Carolina, N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995) (quoting *Chevron*, 467 U.S. at 844)).

In the present case, however, instead of following the directives of *Chevron*, *Zenith* and *Haggar*, the court of appeals stated that it would "continue[] to adhere to its precedent giving no deference to such rulings." Pet. App. 7a (citing *Rollerblade, Inc.* v. *United States*, 112

[8] Paradoxically, the Federal Circuit continued to accord *Chevron* deference to Treasury interpretations of the Tariff Act in customs valuation cases. *Goodman Mfg., L.P.* v. *United States*, 69 F.3d 505, 508 (1995). In *IKO Industries* v. *United States*, 105 F.3d 624, 626 (1997), the court distinguished those cases on the ground that they "did not involve a classification dispute but rather a dispute regarding the proper valuation." This describes rather than explains the court's inconsistency in establishing an artificial distinction between these two "traditional categor[ies] of [customs] litigation" (Re, *supra*, at XXIV).

F.3d at 484). The court stated that *Haggar* involved only the deference owed to "regulations" and that the "reach" of that decision thus "does not extend to standard Customs rulings." Pet. App. 6a-7a. Failing to cite or address the decision of this Court in *Zenith Radio*, the court of appeals stated that the interpretations of the tariff provisions adopted by the agency in the "binding rulings" authorized by 19 U.S.C. 1502(a) are entitled to "no deference" simply because they are interpretive "rulings" rather than "regulations." Pet. App. 7a.

That holding is flatly inconsistent with the decisions of this Court. When, as in this case, Congress has expressly authorized an agency to adopt "such rules and regulations * * * as may be necessary" for the implementation and enforcement of a statutory scheme (19 U.S.C. 1502(a)), the Court has made clear that the agency's interpretive rulings "should be dispositive" "[u]nless demonstrably irrational." *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 565 (1980). Writing for a unanimous Court in the *Milhollin* case, Justice Brennan explained that this standard of deference for interpretive rulings adopted pursuant to delegated authority from Congress exists "for several reasons." *Ibid.* First, such deference is required by "the general proposition that considerable respect is due 'the interpretation given [a] statute by the officers or agency charged with its administration.'" *Id.* at 566 (quoting *Zenith Radio Corp.* v. *United States*, 437 U.S. at 450). Second, by empowering the agency to issue interpretive rulings, Congress has "specifically designated" the agency "as the primary source for interpretation and application of the * * * law." *Ibid.* The Court noted that the legislative history of the statute involved in *Milhollin* revealed "a decided preference for re-

solving interpretive issues by uniform administrative decision, rather than piecemeal through litigation" and concluded that courts must give deference to the agency's interpretive rulings to "honor that congressional choice." *Id.* at 568. In sustaining the interpretive ruling at issue in that case, the Court emphasized that, "while not abdicating their ultimate judicial responsibility to determine the law, * * * judges ought to refrain from substituting their own interstitial lawmaking for that of the [agency]" so long as the agency's interpretation "is not irrational." *Ibid.*[9]

The decisions in *Milhollin* and *Zenith Radio* were the direct precursors of the decision of this Court in *Chevron.*[10] The reasoning of *Chevron* was also presaged by the long line of decisions which have held that the Treasury's formal interpretations of the revenue laws are entitled to this same high degree of judicial deference. In *United States* v. *Correll*, 389 U.S. 299 (1967), the Court applied this established principle in holding that an interpretive ruling adopted by the Treasury under the Internal Revenue Code must be upheld so long as it represents a "reasonable" interpretation of the statute. *Id.* at 307. The Court explained that, although "[a]lternatives to the Commissioner's * * * rule are of course available," the

[9] Professor Monaghan has stated that "[t]he court's task" in such cases "is to fix the boundaries of delegated authority, an inquiry that includes defining the range of permissible criteria. In such an empowering arrangement, responsibility for meaning is shared between court and agency; the judicial role is to specify what the statute cannot mean, and some of what it must mean, but not all that it does mean." Monaghan, Marbury *and the Administrative State*, 83 Colum. L. Rev. 1, 27-28 (1983).

[10] Indeed, the Court cited and relied on *Zenith Radio* in both *Chevron* and *Milhollin*. See 467 U.S. at 843 n.11; 444 U.S. at 566.

agency's interpretative rulings are to be upheld when "reasonable" because "Congress has delegated to the Commissioner, not to the courts, the task of prescribing 'all needful rules and regulations for the enforcement' of the Internal Revenue Code. 26 U.S.C. § 7805(a)." 389 U.S. at 306-307. The Court concluded that "we do not sit as a committee of revision to perfect the administration of the tax laws," and that, "[i]n this area of limitless factual variations, 'it is the province of Congress and the Commissioner, not the courts, to make the appropriate adjustments.'" *Ibid.* (quoting *Commissioner* v. *Stidger*, 386 U.S. 287, 296 (1967)).[11] See

[11] The Court has often stated that such deference is warranted by the greater familiarity, and resulting expertise, of the agency in interpreting and applying such complex statutory schemes. See, *e.g.*, *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 477 (1979) (deference to agency interpretations "helps guarantee that the rules will be written by 'masters of the subject,' *United States* v. *Moore*, 95 U.S. 760, 763 (1878), who will be responsible for putting the rules into effect"). Commentators have observed that such deference to an agency's interpretive rules is necessary "to ensure effective enforcement of complex statutes. * * * [O]ne can compare the sporadic and case-specific character of judicial encounters with issues of statutory meaning, with an agency's continuing responsibilities and policy-implementing perspectives. * * * The more complex the statutory scheme and the more intricate the interrelationships, the larger the risks detailed judicial involvement will present. * * * In such cases, a judge's limited resources, his only occasional opportunities to seek understanding, and the often distorting character of the litigation perspective relative to administration, can lead him to fear that his decision will be more disruptive than helpful to the statutory scheme." Strauss, *One Hundred Fifty Cases Per Year: Some Implications Of The Supreme Court's Limited Resources For*

also *Whirlpool Corp.* v. *Marshall*, 445 U.S. 1, 11 (1980) (an "interpretive regulation * * * is entitled to deference unless it can be said not to be a reasoned and supportable interpretation of the Act").[12]

In *Correll*, as in *Chevron* and the cases following it, the Court has made clear that the deference accorded to the formal interpretations of the agency charged with enforcement of a statute need not be premised on

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Judicial Review Of Agency Action, 87 Colum. L. Rev. 1093, 1126-1127 (1987).

The deference to agency interpretations required in cases such as *Milhollin*, *Correll*, and *Chevron*, "preserve[s] uniformity in federal law" by providing for national determinations made by the administering agency rather than the potentially splintering effect of regional determinations made by lower federal courts. Strauss, *supra*, 87 Colum. L. Rev. at 1126. See also Scalia, *The Rule of Law As a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1178 (1989) ("The common-law, discretion-conferring approach is ill-suited * * * to a legal system in which the supreme court can review only an insignificant proportion of the decided cases.").

[12] An agency may "make a substantive [but] nonlegislative [ruling] binding on private parties" by adopting an "interpretive rule"—a format that Congress has exempted from the notice and comment requirements of the Administrative Procedure Act (5 U.S.C. 553(b)). Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 Duke L.J. 1311, 1313 (1992). Such "interpretive rules" "interpret statutory language which has some tangible meaning, rather than empty or vague language like 'fair and equitable' or 'in the public interest.' An agency may non-legislatively announce or act upon an interpretation that it intends to enforce in a binding way, so long as it stays within the fair intendment of the statute and does not add substantive content of its own. Because Congress has already acted legislatively, the agency need not exercise its own delegated legislative authority. Its attempts to enforce an interpretation can be viewed as simply implementing existing positive law previously laid down by Congress." *Ibid.*

the existence of the sort of express evidence in the legislative history cited by the Court in the *Milhollin* case. See page 23, *supra*. Instead, such deference arises from the "presumption" that, when Congress has "left ambiguity in a statute meant for implementation by an agency," Congress "desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. at 740-741.[13] See also *Chevron*, 467 U.S. at 844 (the delegation may be "implicit rather than explicit"). In the present case, the accuracy of the "presumption" described in *Smiley* and *Chevron* is, in any event, manifestly borne out in the text and history of the statute. By authorizing the agency to adopt "binding rulings prior to the entry of the merchandise" in order "to secure a just, impartial, and uniform appraisement of imported merchandise and the classification and assessment of duties thereon" (19 U.S.C. 1502(a)), Congress stated its plain intention that "[t]he Customs Service will be responsible for interpreting and applying" this statute (H.R. Conf. Rep. No. 576, *supra*, at 549-550).

4. This is thus not a case like *Christensen* v. *Harris County*, 120 S. Ct. 1655 (2000), in which the Court

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[13] "[T]he degree of deference that a court should give any agency interpretation of law is properly, within broad constitutional limits, entirely a matter of legislative intent. Recognizing that fact, however, will not generally prove very helpful, for legislatures do not often provide much evidence of their intention to delegate law-making power. Consequently, rules tying the degree of deference to be accorded agency action to the type of agency action involved may become necessary. * * * Any such rules, however, remain residual rules: they may not trump evidence of a contrary legislative intent." Monaghan, *supra*, 83 Colum. L. Rev. at 31 n.184.

recently concluded that a lesser standard of deference applies to an agency opinion issued in an informal format (such as correspondence or agency manuals) that "Congress has not authorized for that purpose" (1 Kenneth C. Davis & Richard J. Pierce, *Administrative Law Treatise* § 3.5, at 120 (3d ed. 1994), cited with approval at *Christensen* v. *Harris County*, 120 S. Ct. at 1663).[14] In the *Christensen* decision, the Court stated that informal agency rulings "contained in formats such as opinion letters[,]" "policy statements, agency manuals, and enforcement guidelines" are only "'entitled to respect' under our decision in *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944)" and "do not warrant *Chevron*-style deference." 120 S. Ct. at 1662, 1663.[15] In the present case, the format selected by the

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[14] The respondent in *Christensen* quoted this extract from the Davis treatise in arguing that "the informal, private Opinion Letter" involved in that case was entitled to less force "than the Secretary's published, formal interpretations of the FLSA" because it was issued in a format that Congress had not authorized. Resp. Br. No. 98-1167 at 31-32. In holding that the private opinion letter at issue in that case was "entitled to respect" but did not "warrant *Chevron*-style deference," the Court cited (but did not quote) the portion of the Davis treatise on which respondent relied. 120 S. Ct. at 1663.

[15] The Court stated in *Christensen* that "interpretations contained in formats such as opinion letters are 'entitled to respect' under * * * *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 * * * (1944), but only to the extent that those interpretations have the 'power to persuade,' *ibid.*" 120 S. Ct. at 1663. The Court cited three decisions in support of the proposition that informal agency interpretations such as private opinion letters, guidelines and manuals are entitled only to the "respect" warranted under the *Skidmore* opinion. 120 S. Ct. at 1662-1663, citing *Reno* v. *Koray*, 515 U.S. 50, 61 (1995); *EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244, 256-258 (1991); *Martin* v. *Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 157 (1991). None of the cited

agency—the formal adoption and issuance of binding interpretive rulings—is precisely the format authorized by Congress for this purpose. As this Court held in *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. at 568, by

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decisions, however, concerned an interpretive rule (such as the rule involved in the present case) that was adopted by an agency in the very format that Congress has expressly authorized for that purpose.

For example, in *Reno* v. *Koray*, 515 U.S. at 61, the agency had adopted "an internal agency guideline" rather than a formal interpretive rule. The Court nonetheless cited and relied on *Chevron* in holding that the agency's views were entitled to "some deference" as a "permissible construction of the statute." *Ibid.* (quoting *Chevron*, 467 U.S. at 843). In *EEOC* v. *Arabian American Oil Co.*, 499 U.S. at 257, the Court declined to afford *Chevron* deference to an interpretive rule issued by the EEOC expressly because "Congress, in enacting [the relevant statute,] *did not confer upon the EEOC authority to promulgate rules or regulations.*" *Ibid.* (quoting *General Elec. Co.* v. *Gilbert*, 429 U.S. 125, 141 (1976) (emphasis added)). The interpretation involved in the *EEOC* case, like the interpretation involved in *Christensen*, had thus not been made in a "format" that Congress had authorized. The Court therefore afforded the EEOC's ruling the deference owed under *Skidmore*, rather than deference required by *Chevron*. *Ibid.* Finally, in *Martin* v. *Occupational Safety & Health Review Comm'n*, 499 U.S. at 157, the Court stated that "informal interpretations" and enforcement guidelines would be entitled only "to some weight on judicial review" *unless "the interpretation assumes a form expressly provided for by Congress."* *Ibid.* (emphasis added).

None of these cases supports the contention of respondent that interpretive rulings that are formally adopted in a format that Congress *has* prescribed are not entitled to *Chevron* deference. Numerous decisions of this Court—including *Zenith Radio*, *Milhollin* and *Correll*—reflect that agency interpretive rulings adopted in a format that Congress has prescribed are to be sustained if they represent a "reasonable" interpretation of the statute. See pages 23-27, note 11, *supra*.

affording deference to the agency's formal interpretations, the Court "honor[s] that congressional choice." See also *Martin* v. *Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 157 (1991) (deferring to an agency interpretation when issued in "a form expressly provided for by Congress"); *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 70, 75 (1975) (deferring to formally adopted "guidelines" applied in agency determination).

In 19 U.S.C. 1502(a), Congress expressly authorized the Customs Service to adopt and issue "binding rulings" to address and resolve tariff classification issues. See page 2, *supra*. Pursuant to that statute, the agency has specified that a (19 C.F.R. 177.9(a)):

> ruling letter [thus] issued by the Customs Service * * * represents the official position of the Customs Service with respect to the particular transaction or issue described therein and is binding on all Customs Service personnel * * * until modified or revoked. In the absence of a change of practice or other modification or revocation which affects the principle of the ruling set forth in the ruling letter, that principle may be cited as authority in the disposition of transactions involving the same circumstances.

Respondent errs in suggesting (Br. in Opp. 9) that the "binding rulings" adopted under this statute are not really binding because the regulations caution that they are "subject to modification or revocation without notice" (19 C.F.R. 177.9(c)) and apply "only with respect to transactions involving articles identical" to those addressed in the ruling request (19 C.F.R. 177.9(b)(2)). Respondent fails to note that the regulations make clear that, unless modified or revoked, the classification

rulings adopted by the agency under these procedures are "precedential" and "may be cited as authority in the disposition of transactions involving the same circumstances." 19 C.F.R. 177.9(a).

Because the agency's interpretive rulings were issued in the format that Congress authorized for this specific purpose, the courts below should have deferred to these rulings and upheld them if they "implement the congressional mandate in some reasonable manner." *United States* v. *Correll*, 389 U.S. at 307.[16] See also *Zenith Radio* v. *United States*, 437 U.S. at 450.[17] Otherwise, the legislative intent that the agency employ such "binding rulings" to ensure that "the statute is applied in a consistent and proper manner" to all

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[16] The agency has followed the format prescribed by Congress for issuing "binding" interpretive rulings in this case. See 19 U.S.C. 1502(a); 19 C.F.R. 177.9(a). When, as here, "the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited." *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111, 131 (1944). The agency's interpretation of the statutory term is to be accepted in this context if it has "a reasonable basis in law." *Ibid.*

[17] Nothing in the *Christensen* decision purported to overrule these longstanding precedents that accord a high degree of deference to the interpretations of the revenue laws set forth in Treasury Department rulings. In *Skidmore*, the Court had emphasized that it "has long given considerable and in some cases decisive weight to Treasury Decisions and to interpretative regulations of the Treasury and of other bodies that were not of adversary origin." 323 U.S. at 140. And in *Correll*, which was decided twenty years *after Skidmore*, the Court held that Treasury rulings are to be sustained when they set forth a "reasonable" interpretation of the statute. 389 U.S. at 307.

taxpayers (*United States* v. *Haggar Apparel Co.*, 526 U.S. at 392) would be defeated.[18]

5. The holding of the court of appeals that "no deference" would be accorded to the agency's "binding rulings," and the court's refusal to consider or address the reasoning set forth in those rulings,[19] also cannot be reconciled with the holding in *Christensen* that even informally stated agency opinions are entitled to "some deference" (120 S. Ct. at 1662 (quoting *Reno* v. *Koray*,

[18] While the Court in *Christensen* noted that substantive regulations issued under the notice and comment procedures of the APA are the paradigmatic example of agency action for which judicial deference is required (120 S. Ct. at 1662), this Court has long made clear that, when Congress has authorized the agency to act by alternative methods, the route selected is a matter committed to the agency's discretion. See *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 292-293 (1974); *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202 (1947). Congress has, in fact, directed the Customs Service to employ notice and comment procedures for "binding rulings" *only* when the ruling would "modify * * * or revoke a prior interpretive ruling or decision which has been in effect for at least 60 days" or would "have the effect of modifying the treatment previously accorded by the Customs Service to substantially identical transactions." 19 U.S.C. 1625(c)(1),(2). Pursuant to that statute, the interpretive issues involved in this case have been aired before the public in several precedential Customs Service rulings. See 31 Cust. Bull. 14 (Aug. 27, 1997)(proposing to issue HQ 960542, 960762, 960763 & 960764); 31 Cust. Bull. 7 (Oct. 22, 1997) (adopting those rulings); 29 Cust. Bull. 23 (Apr. 12, 1995) (proposing to issue HQ 957667); 29 Cust. Bull. 17 (May 31, 1995) (adopting that ruling).

[19] In holding that "no deference" is to be given to the agency's interpretive rulings, the court of appeals relied (Pet. App. 6a-7a) on *Rollerblade, Inc.* v. *United States*, 112 F.3d 481, 483-484 (Fed. Cir. 1997). The *Rollerblade* decision, however, had based its "no deference" conclusion on an interpretation of 28 U.S.C. 2643(b) which this Court unanimously rejected in *United States* v. *Haggar Apparel Co.*, 526 U.S. at 390-392.

515 U.S. at 61)), are "entitled to respect" from the courts, and should therefore, at a bare minimum, be reviewed to determine if they have the "power to persuade" (120 S. Ct. at 1663 (quoting *Skidmore* v. *Swift & Co.*, 323 U.S. at 140)). The conclusion of the Federal Circuit in the present case that no consideration whatever should be given to the content or reasoning of the agency's binding rulings (Pet. App. 7a) is thus squarely inconsistent with *all* of the standards of deference described in this Court's decisions.

In particular, even an informally announced agency interpretation which (unlike the "binding rulings" involved in this case) has *not* been issued in a format that Congress has prescribed for interpretive pronouncements would still warrant "some deference" under *Skidmore* v. *Swift & Co.*, 323 U.S. at 140. The deference afforded to such informal pronouncements would be based upon (*ibid.*):

> the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all of those factors which give it power to persuade, if lacking power to control.

The open-ended list of factors described in *Skidmore*, of course, provides only limited guidance to the parties or to the courts.[20] Because the outcome of each dispute would be relatively unpredictable under that formulation, a broad application of that approach would necessarily magnify the volume and cost of administrative

[20] "Prior to *Chevron*, courts had frequently done what *Chevron* prohibited: they imposed their own constructions on ambiguous agency-administered statutes." Pierce, *Reconciling* Chevron *and Stare Decisis*, 85 Geo. L.J. 2225, 2225 (1997).

litigation.[21] See, *e.g.*, *United States* v. *Correll*, 389 U.S. at 306-307; note 11, *supra*. It would also undercut the traditional choice that agencies possess in selecting the "format" in which they elect to issue statutory interpretations. See note 18, *supra*. Nonetheless, even under the *Skidmore* standard, the court of appeals erred in flatly holding that the agency's "binding ruling" was entitled to "no deference" in this case.

II. THE CUSTOMS SERVICE REASONABLY INTERPRETED THE STATUTORY CLASSIFICATION OF "BOUND" "DIARIES" TO INCLUDE THE SPIRAL AND RING-BOUND DAY PLANNERS IMPORTED BY RESPONDENT

Under the proper standard of deference that applies to agency interpretations of the "statutes that they are charged with administering" (*Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. at 739), the Customs Service classification ruling should have been sustained in this case. The Headquarters Rulings involved here were not sparsely explained or hidden from public view. See Pet. App. 28a-47a; note 1, *supra*. To the contrary, the agency's rulings set forth a significantly more refined, and less wooden, interpretation of the statutory language than is manifested in the decision of the court of appeals.

The tariff classification issue in this case requires interpretation of two terms in Subheading 4820.10.20 of the HTSUS—"diaries" and "bound." The court of

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[21] When courts apply a standard that "directs [the] consideration of so many elements, * * * almost any result may be justified." *Missouri* ex rel. *S.W. Bell Tel. Co.* v. *Public Serv. Comm'n*, 262 U.S. 276, 292, 298 (1923) (opinion of Brandeis and Holmes, JJ.).

appeals refused to consider the detailed Headquarters Rulings (HQ No. 955937 and HRL Nos. 955636, 955637) issued by the Customs Service that have "consistently determined that articles similar in design and/or function to the instant merchandise are classifiable as diaries." Pet. App. 31a. In these rulings, the Service has rejected respondent's reliance on narrowly selected dictionary definitions, noting that "[m]any words have several definitions and Customs may consider any or all of them when making a classification determination." *Id.* at 33a.[22] In particular, the Customs Service has explained that reliance on any single, narrow definition is inconsistent with the commercial context in which the tariff provisions apply: business "diaries" are a recognized commercial product and this "broader concept of diary * * * reflects the common and commercial identity of these items in the marketplace." *Id.* at 34a.[23]

The Customs Service has also properly concluded that these daily planners are "bound" for purposes of HTSUS 4820.10.20. Pet. App. 44a-46a. The Customs Service disagreed with respondent's contention that a definition of a "bound book" from the publishing industry controls in determining whether a "diary" is "bound" under this Subheading. "The issue is not what constitutes a bound book, and there is no requirement

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[22] The Customs Service correctly noted that "the narrower definition of 'diary', as set forth in the *Oxford English Dictionary's* first definition, connotes an article containing blank pages used to record extensive notations of one's daily activities. This is not the sole format for a diary." Pet. App. 33a.

[23] The Customs Service found additional support for this functional approach in the precedents of the former Customs Court. Pet. App. 36a-40a (citing *Fred Baumgarten* v. *United States*, 49 Cust. Ct. 275 (1962), and *Brooks Bros.* v. *United States*, 68 Cust. Ct. 91 (1972)).

that a diary be in the format of a book." *Id.* at 44a. The Service instead relied on the Harmonized Commodity Description and Coding System Explanatory Notes—"which represent the official interpretation of the HTS at the international level"—which state that "goods of this heading may be bound with materials other than paper (e.g., leather, plastics or textile material) and have reinforcements or fittings of metal, plastics, etc." *Id.* at 45a.[24] The agency concluded that this official explanation makes it "clear that the Harmonized System Committee contemplated metal binders as being within this heading's definition of bound articles." *Ibid.* The conclusion that respondent's daily planners are "bound" under this Subheading not only comports with the official interpretation of the drafting authority, it also makes "semantic" sense: "[A] binder, whether a ring binder or spiral, is that which binds pages together in a fixed order. Pages held together in this manner are bound, and the diary is therefore deemed a bound article." *Id.* at 46a.

The court of appeals did not suggest that the agency's thorough, well-formulated interpretation of the statute is not a reasonable elaboration of its

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[24] The Harmonized Commodity Description and Coding System Explanatory Notes set forth the official interpretation of the international organization that drafted the nomenclature that serves as the basis of the HTSUS. These Explanatory Notes "are intended to clarify the scope of HTSUS subheadings and to offer guidance in interpreting subheadings." *Mita Copystar Am.* v. *United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994). While the Explanatory Notes are not "legally binding on the United States," they are "generally indicative of proper interpretation of the various provisions of the [HTSUS]." *Lynteq, Inc.* v. *United States*, 976 F.2d 693, 699 (Fed. Cir. 1992) (quoting H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 549 (1988)).

provisions. Instead, the court of appeals simply displaced the agency's reasonable interpretation of the Tariff Act with another, perhaps plausible, interpretation of its own. See pages 8-10, 12-15, *supra*.[25] That action by the court of appeals was in error: "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. When, as in this case, the agency's interpretation "defines a term in a way that is reasonable in light of the legislature's revealed design," the agency's judgment is to be given "controlling weight." *Nationsbank of North Carolina, N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. at 257. See also note 7, *supra*.

Even under the *Skidmore* formulation, the decision of the court of appeals would have erred by failing to give the agency's interpretation "great deference." *United States* v. *Consumer Life Ins. Co.*, 430 U.S. 725, 751-752 (1977). Moreover, the refusal of the court of appeals to defer to the agency's interpretations of the detailed classification provisions of the Tariff Act has substantial practical importance. The agency routinely employs "binding rulings," rather than regulations, to address the proper application of the detailed customs provisions to the "limitless factual variations" created

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[25] In view of the fact that the court of appeals declined to consider industry usage, and failed to address the official interpretation of the tariff provision by the international drafting authority, it could fairly be questioned whether the decision of the court of appeals itself bears the indicia of a "reasonable" elaboration of the statute. See pages 12-15, *supra*. Moreover, in insisting that a diary must be retrospective rather than prospective in nature, the court of appeals ignored the fact that notations of forthcoming appointments or engagements also serve as a retrospective record of those events after they have occurred.

by modern commerce (*United States* v. *Correll*, 389 U.S. at 307).[26] By denying deference to the agency's interpretations of these intricate statutory provisions, the Federal Circuit has left both importers and the Customs Service without effective guidance for a wide range of transactions. The result of the *ad hoc* approach adopted by the court of appeals is expensive customs litigation and unpredictable outcomes.

Indeed, this Court has previously rejected the inefficiency and uncertainty that would result from the non-deferential approach adopted by the court of appeals in holding in *Zenith Radio*, 437 U.S. at 450, that the agency's "reasonable" interpretive rulings under the Tariff Act are to be sustained by a reviewing court. When, as here, "the administrator's reading fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design," the administrative interpretation should be given "controlling weight." *Nationsbank of North Carolina, N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. at 257 (quoting *Chevron*, 467 U.S. at 844).

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[26] The agency advises us that its Headquarters Office issues an average of more than 1000 "binding rulings" each year involving tariff classification, customs valuation and country of origin determinations.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

THE MEAD CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR RESPONDENT

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STATEMENT PURSUANT TO RULE 29.6

Respondent The Mead Corporation has no parent company, and there is no publicly held company which owns 10% or more of The Mead Corporation's stock.

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CITATIONS OF OPINIONS BELOW

Petitioner (the "Government") cites Customs Service ("Customs") Headquarters Ruling Letter No. ("HQ") 955937 (Oct. 21, 1994), reported unofficially at 1994 WL 712863 (Appendix to Petition ("Pet. App.") 28a-47a), as "[t]he Customs Service ruling that applies to this case." However, the classification rejected by the United States Court of Appeals for the Federal Circuit ("Federal Circuit") was first made in Customs HQ 953126 (Jan. 11, 1993), reported unofficially at 1993 WL 68471 (Appendix to Respondent's Brief in Opposition ("Opp. App.") 4a-6a) which revoked and modified New York Customs Ruling Letter No. ("NY") 864206 (June 19, 1991), reported unofficially at 1991 U.S. Custom NY LEXIS 344 (Opp. App. 1a-3a).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

In addition to the provisions set out by the Government, the following statutory and regulatory provisions are pertinent to the Court's consideration:

1. General Rule of Interpretation ("GRI") 1 of the Harmonized Tariff Schedule of the United States, 19 U.S.C. § 1202:

   Classification of goods in the tariff schedule shall be governed by the following principles:

   1. The table of contents, alphabetical index, and titles of sections, chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the following provisions . . . .

2. The tariff provisions under which the imported loose-leaf day planners were classified by Customs and claimed

classifiable by Mead, heading 4820 and subheadings 4820.10, 4820.10.20 and 4820.10.40 of the Harmonized Tariff Schedule of the United States ("HTSUS"), are set forth in their entirety:

4820 Registers, account books, notebooks, order books, receipt books, letter pads, memorandum pads, diaries and similar articles, exercise books, blotting pads, binders (loose-leaf or other), folders, file covers, manifold business forms, interleaved carbon sets and other articles of stationery, of paper or paperboard; albums for samples or for collections and book covers (including cover boards and book jackets) of paper or paperboard:

4820.10 Registers, account books, notebooks, order books, receipt books, letter pads, memorandum pads, diaries and similar articles:

4820.10.20 Diaries, notebooks and address books, bound; memorandum pads, letter pads and similar articles 3.6%

4820.10.40 Other 0%

3. 19 C.F.R. § 177.1 General ruling practice and definitions:

(d) *Definitions.* (1) A "ruling" is a written statement issued by the Headquarters Office or the appropriate office of Customs as provided in this part that interprets and applies the provisions of the Customs and related laws to a specific set of facts. A "ruling letter" is a ruling issued in response to a written request therefor and set forth in a letter addressed to the person making the request or his designee. A "published ruling" is a ruling which has been published in the Customs Bulletin.

4. 19 C.F.R. § 177.9 Effect of ruling letters; modification or revocation:

(c) *Reliance on ruling letters by others.* A ruling letter is subject to modification or revocation without notice to any person, except the person to whom the letter was addressed. Accordingly, no other person should rely on the ruling letter or assume that the principles of that ruling will be applied in connection with any transaction other than the one described in the letter.

STATEMENT OF THE CASE

Petitioner asserts that Customs' day-to-day classification rulings are entitled to judicial deference, but it does not specify whether the deference sought is controlling-weight deference or merely respectful consideration. The Government's lack of specificity is telling, as this Court's jurisprudence leads to the conclusion that classification rulings in general are entitled to little, if any, respect. Nevertheless, the level of deference sought is ultimately immaterial, as Customs' tariff classification at issue arises out of a statutory construction which contravenes the express language of the tariff schedules and, thus, is entitled to no deference.

This case concerns the proper tariff classification of five models of loose-leaf day planners imported into the United States in 1995 from China by Respondent, The Mead Corporation ("Mead").[1] The five day planners were classified by Customs as "bound diaries" under HTSUS subheading 4820.10.20, and were assessed with a 3.6% rate of duty.[2] It is

1. Mead, an Ohio corporation, is one of the world's largest manufacturers of paper, the largest United States manufacturer and distributor of school supplies and a leading provider of stationery products in the United States.

2. For the years 1993 and 1994, subheading 4820.10.20 carried a 4.0% rate of duty. Beginning January 1, 1995, the duty rate for goods classifiable thereunder has been annually reduced by .4%. The reductions will continue until the duty reaches 0% on January 1, 2004. The Government erroneously states that the HTSUS subheading

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Mead's position that the proper statutory construct of heading 4820 and subheadings 4820.10 and 4820.10.20 requires no agency interpretation and establishes that loose-leaf day planners are neither "diaries" nor "bound," and are, therefore, correctly classifiable under the basket "other" provision, subheading 4820.10.40, which was and remains a duty-free tariff provision.

Mead imported five styles of day planners. (Actual specimens of the five day planners may be found in the record below at Plaintiff's Exhibits 1-5 in the summary judgment proceedings before the United States Court of International Trade ("CIT").) Similar office supply products are sold by competitors as "organizers" or "agendas," but whether characterized as day planners, agendas or organizers, the articles are designed to assist individuals in organizing their activities and schedules in a convenient, multi-functional product.[3]

Included in all of the Mead day planners are a calendar, "daily planner" pages, telephone/address sheets, a notepad and information sheets. Some models also contain additional features, such as a plastic ruler, plastic pouch, credit card holder and computer diskette holder. All of the contents of the day planner (except for the notepad, which is inserted into a rear flap of the day planner's outer cover) are held in place in a loose-leaf ring binder.[4] The loose-leaf structure permits the contents of the day planners to be easily repositioned, removed

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4820.10.20 duty rate in 1993 and 1995 was 3.2%. Brief for the United States ("Pet. Br.") at 7. The duty rate for these years was actually 4.0% and 3.6%, respectively.

3. For convenience, such articles are referred to as "day planners" in this brief.

4. Although the second Question Presented by the Government asserts that the day planners imported by Mead include "spiral-bound" day planners, Pet. Br. at (I), the day planners at issue are all "loose-leaf" items arranged in ring binders. *See* Plaintiff's Exhibits 1-5. None are spiral-bound.

or replaced. An "Accessories & Refills" sheet, provided with the day planners, enables the consumer to order replacements and refills for the different sections.

Customs' Role in Tariff Classifications

The Harmonized Tariff Schedule of the United States became effective on January 1, 1989. *See* Omnibus Trade and Competitiveness Act of 1989, § 1217, Pub. L. No. 100-418, 102 Stat. 1107, 1163. The HTSUS replaced the Tariff Schedule of the United States ("TSUS") which had regulated the importation of goods since 1963. All goods must be assigned an HTSUS classification and corresponding duty rate when imported into the United States. Although it is not mandatory, prudent importers generally seek a binding classification ruling from Customs when importing a new product. To obtain a classification ruling on a specific article, an importer must submit a written request to Customs prior to importation. 19 C.F.R. §§ 177.1, 177.2.

A Customs ruling involves mixed questions of fact and law for it "is a written statement issued by the Headquarters Office or the appropriate office of Customs . . . that interprets and applies the provision of the Customs and related laws to a specific set of facts." 19 C.F.R. § 177.1(d)(1). Regulations provide that ruling letters can be sought from any of Customs' 45 service ports of entry.[5] 19 C.F.R. § 177.2(a). Currently, 10,000 to 15,000 rulings a year are issued from the various ports[6] and Headquarters.[7]

5. Customs service ports of entry are enumerated in 19 C.F.R. § 101.3(b)(2).

6. *See* Treasury Advisory Committee on the Commercial Operations of the United States Customs Service, Report of the COAC Subcommittee on OR&R, Exhibit 1 (January 26, 2000).

7. The term "Headquarters" or "Headquarters Office" or "Customs Headquarters" means the Office of Regulations and Rulings at Headquarters, United States Customs Service, Washington, D.C. 19 C.F.R. § 177.1(d)(6).

The rulings before the Court were issued without notice-and-comment; they were not published in the Customs Bulletin or the Federal Register.[8] Once issued, a ruling letter is binding only upon other transactions involving the same item and same importer: "[N]o other person should rely on the ruling letter or assume that the principles of that ruling will be applied in connection with any transaction other than the one described in the letter." 19 C.F.R. § 177.9(c).

The huge number of rulings issued each year (10,000 to 15,000) and the great number of ports authorized to issue ruling letters (45) create a serious likelihood of inconsistencies in the classification rulings issued. In recognition of this circumstance, Congress directed, in Section 7361(c) of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181, 4474-75, that Customs promulgate regulations specifically addressing problems created by inconsistent rulings. *See* 19 C.F.R. § 177.12 ("Inconsistent customs decisions").

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8. The Government's inclusion, in the "Statutory and Regulatory Provisions Involved," of 19 C.F.R. § 177.10(c), which requires notice-and comment publication in the Federal Register for rulings that have "the effect of changing a practice," is misleading. Pet. Br. at 5. This regulation has no bearing on this appeal, as its application is limited to rulings that have established a "uniform practice." *See Old Republic Ins. Co. v. United States*, 645 F. Supp. 943, 947-48 (Ct. Int'l Trade 1986) (19 C.F.R. § 177.10(c) notice requirements not applicable to rulings that do not establish a "uniform practice"). A "uniform practice" may only be established by (i) a formal "finding" by the Secretary of Treasury, (ii) a ruling published in the Customs Bulletin pursuant to 19 C.F.R. § 177.10(b) or (iii) "evidence of uniform classification and liquidation of merchandise at various ports over an extended period of time." *Heraeus-Amersil, Inc. v. United States*, 795 F.2d 1575, 1580-81 (Fed. Cir. 1986). Neither party has claimed that any classification of Mead's day planners is a "uniform practice." Further, the Federal Circuit specifically excluded from its holding below rulings proposing changes in uniform practice that are published in the Federal Register pursuant to 19 C.F.R. § 177.10(c). Pet. App. 6a n.1.

The classification and duty rate for the goods imported become final unless the importer, pursuant to 19 C.F.R. § 174.12, files an administrative protest contesting the liquidation[9] of the entry. 19 U.S.C. § 1514. Customs provides a one-page form for filing protests, with spaces for the importer to identify the port of entry and describe the imported item. 19 C.F.R. § 174.13; Customs Form 19. The form also has a space (one inch high, extending the full width of the page) for the importer to list "Detailed Reasons for Protest," with an opportunity for the importer to attach additional pages if desired. *Id.* The protest is usually decided at the local port of entry, without further submissions, unless the importer seeks "further review" of the classification at Customs Headquarters. 19 C.F.R. §§ 174.23, 174.29. If the importer's request for "further review" is granted, Headquarters issues a final decision addressing the reasons provided on the form; if the importer's request is rejected, the local port will make the final determination on the protest. *See* 19 C.F.R. § 174.26.

The CIT has exclusive jurisdiction to hear actions contesting the denial of importers' classification protests. 28 U.S.C. § 1581(a). Before appealing to the CIT, the importer must exhaust its administrative remedies, including filing an administrative protest.[10] 19 U.S.C. § 1514; 28 U.S.C. § 2637. The CIT is statutorily required to review protested customs classification cases *de novo*. 28 U.S.C. § 2640(a). Once the classification dispute is before the CIT, the presumption of correctness places the burden of proof on the importer to establish, by a preponderance of the evidence, that Customs' classification was incorrect. 28 U.S.C. § 2639(a)(1).

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9. "Liquidation" is a term of art referring to the final accounting between Customs and the importer for the duties owed on an entry. *See* 19 C.F.R. § 159.1.

10. An importer is not required to request "further review" of a protest before seeking judicial review in the CIT. *See* 19 C.F.R. § 174.23.

Classification Rulings of Day Planners, Including Mead's

Classification determinations involving diaries were originally made pursuant to paragraph 1410 of the Tariff Act of 1930, as modified by several treasury decisions. The Tariff Act contained a provision for "blank books, slate books, drawings, engravings, photographs, etchings, maps, and charts." Tariff Act of 1930, ch. 497, § 1410, 71st Cong., Sess. II. In 1956, a separate duty rate provision was created for "[a]ddress books, diaries, and notebooks" as a subdivision of "blank books and slate books." T.D. 53865, 90 Treas. Dec. 234 (1955). Blank books and slate books that were not "diaries, notebooks, and address books" were separately classified, T.D. 53877, 90 Treas. Dec. 280 (1956), but no distinction was made *within* the classification of diaries.

On August 31, 1963, the TSUS became the official schedule for classification of imported articles. Proclamation No. 3598, *as authorized by* Tariff Classification Act of 1962, Pub. L. No. 87-456, 76 Stat. 72. The relevant classification provision, listed under the section titled "Paper, Paperboard, and Products Thereof," appeared in the TSUS as follows:

> Blank books, bound:
> 256.56 Diaries, notebooks, and address books
> 256.58 Other

TSUS, 19 U.S.C. § 1202. The classification for "diaries" under the TSUS, like its predecessor tariff provisions, distinguished only between "diaries," "notebooks," "address books" and "other" blank books.

Effective January 1, 1989, the HTSUS replaced the TSUS as the tariff schedules under which imported articles were to be classified by Customs. The provisions applicable to diaries changed substantially, providing narrower categories for their classification: Subheading 4820.10 included the broad category of "diaries and similar articles," which was divided into

subheading 4820.10.20 ("Diaries, notebooks and address books, bound . . .") and subheading 4820.10.40 ("Other"). Unlike its predecessor tariff schedules, the HTSUS drew an express distinction between "bound diaries" and "diaries and similar articles."

In the earliest years following the adoption of the HTSUS, day planners were viewed by Customs not as "diaries" under subheading 4820.10, but as articles similar to diaries, resulting in a duty-free classification as "other," under subheading 4820.10.40. *See, e.g.*, HQ 085086 (Sept. 13, 1989), 1989 WL 381276 (internal agency letter classifying "Select School Agenda and Planning Guide") (Joint Appendix to Federal Circuit ("Fed. Cir. JA") 30-31); HQ 085515 (Dec. 14, 1989), 1989 WL 381472 (issued to Premier Printing Ltd., classifying student agendas and teacher multi-purpose blank books) (Fed. Cir. JA 32-34); HQ 950984 (Jan. 27, 1992), 1992 WL 313509 (issued to Advance Shipping Co., Inc., classifying agenda book) (Fed. Cir. JA 35-36). Because Customs regulations precluded Mead from relying on classification rulings provided to other importers on non-identical articles, *see* 19 C.F.R. § 177.9(c), Mead sought a classification ruling for its own day planners. In NY 864206 (June 19, 1991) (Opp. App. 1a-3a), consistent with its earlier issued day planner rulings, Customs expressly ruled that Mead's day planner model 47104 was not a "bound diary" but was properly classifiable as an article similar to a diary under the basket "other" provision.

In 1993, however, Customs issued, *sua sponte*, HQ 953126 (Jan. 11, 1993),[11] in which it revoked the prior classification of

11. While HQ 953126 is indisputably the Customs classification ruling that first classified Mead's day planners as "bound diaries" under subheading 4820.10.20, it is not the ruling to which Customs has sought deference. Indeed, HQ 953126 is not even referenced in the Government's brief. Instead the Government has focused the Court's attention on HQ 955937 (Oct. 21, 1994), the protest decision issued by Headquarters in response to Mead's request for further review of the classification set forth in HQ 953126.

Mead's day planners.[12] (Opp. App. 4a-6a). This ruling reclassified Mead's loose-leaf day planners as "bound diaries" under HTSUS subheading 4820.10.20, and imposed a duty of 4.0%.[13] *Id.* In response to this adverse and unexpected ruling, Mead filed administrative protest number 4501-93-100016, contesting the modified classification and resulting increase in duty rate. The protest should have been mooted by Customs' August 18, 1993 approval of Mead's independent request that the entries entered within 90 days of the issuance of HQ 953126 be reliquidated duty-free, because of Mead's detrimental reliance on the earlier 1991 ruling. *See* HQ 953690 (Aug. 18, 1993)[14] (Opp. App. 7a-10a). Despite the grant of detrimental reliance, Customs superfluously denied Mead's protest in HQ 955937 (Oct. 21, 1994) (Pet. App. 28a-47a).[15]

12. In the Customs Modernization Act of 1993, Congress amended 19 U.S.C. § 1625 to require that Customs implement notice-and-comment procedures with respect to any "interpretive ruling" that would "modify . . . or revoke a prior interpretive ruling or decision." 19 U.S.C. § 1625(c). That notice-and-comment procedure does not require publication in the Federal Register. *Id.* Notice-and-comment procedures are not, however, required for new classification decisions. The amendment went into effect on December 8, 1993, nearly one year after the issuance of Customs' modification of the classification of Mead's imported day planners. *See* Customs Modernization Act of 1993, Pub. L. No. 103-182, 107 Stat. 2057, 2099; HQ 953126 (Jan. 11, 1993) (Opp. App. 4a-6a). Customs was thus not required to — and, in fact, did not — go through notice-and-comment procedures before changing the classification of Mead's day planners.

13. To challenge Customs' classification and duty rate assessment on its imported day planner entries, Mead has been required to file (and continues to file for its current imports), administrative protests against the liquidation of its entries. 19 U.S.C. § 1514(a)(2).

14. No Westlaw or Lexis reference is provided for rulings that are not currently available through those public databases.

15. Mead's decision not to seek review of the denial of this particular protest was not an acceptance of the classification. *Cf.* Pet. Br. at 10. Rather, judicial review of that denial was not possible,

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Procedural History

Following denial of protest number 4501-95-100100, Mead commenced an action in the CIT to contest Customs' classification of its day planners. Mead and Customs both sought *de novo* review of the appropriate classification for the Mead day planners (*see* 28 U.S.C. § 2640(a)(1)), and both parties immediately made cross-motions for summary judgment. Mead sought a judgment that the day planners should be properly classified, as they originally had been, under the duty-free "other" provision, subheading 4820.10.40. In support of its motion, Mead submitted affidavits of nine experts in the stationery and bookbinding industry, establishing that Customs' definitions of "diaries" and "bound" conflicted with common commercial usage of the words, Fed. Cir. JA 98-103, 107-127, and the Government submitted two affidavits of purported experts in the binding and leather goods industries in support of Customs' definitions, *id.* at 134-135, 183-184. Customs contended that its classification was correct, and included an argument that deference pursuant to *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), should be accorded to its classification ruling. However, Customs expressly withdrew its deference argument, by letter to the court, before the CIT considered the issue.[16] Opp. App. 11a-12a.

On July 14, 1998, the CIT entered judgment in favor of Customs, affirming Customs' classification of the Mead day planners under subheading 4820.10.20. Pet. App. 19a-27a. The

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as Mead had already obtained complete relief from any obligation to pay a duty on the affected entries as a result of the August 1993 grant of detrimental reliance relief. Opp. App. 7a-10a. Any judicial review of the classification of Mead's loose-leaf day planners would therefore have to be sought based on denial of a subsequent protest. *See* n.13, *supra*.

16. *See* Respondent's Brief in Opposition ("Opp. Br.") at 13-15.

CIT reviewed the classification *de novo* and reached the same conclusion that Customs had reached, applying the same flawed reasoning set forth in HQ 955937 (Oct. 21, 1994).

Mead appealed the CIT decision to the Federal Circuit.[17] Customs, consistent with the position it took in the lower court, limited the scope of its arguments to the meaning of the tariff terms "diaries" and "bound," and did not request deference to any underlying Customs classification rulings. However, after the appeal had been fully briefed, this Court issued its decision in *United States v. Haggar Apparel Co.*, holding that Customs notice-and-comment regulations are entitled to controlling weight under *Chevron*. 526 U.S. 380 (1999). Reacting to that decision, the Federal Circuit requested supplemental briefs on the question, "How, if at all, does the Supreme Court's decision in *United States v. Haggar Apparel Co.*, 119 S. Ct. 1392 (1999), affect this court's standard of review of classification rulings issued by the United States Customs Service?". Opp. App. 13a-14a.

After receiving the requested supplemental briefs, the Federal Circuit issued its decision on the proper tariff classification of Mead's loose-leaf day planners. Pet. App. 1a-18a. The Federal Circuit reversed the CIT on two independent bases,[18] concluding that (i) the Mead loose-leaf day planners were not "diaries" under subheading 4820.10.20, and (ii) the Mead loose-leaf day planners were not "bound" under subheading 4820.10.20, and ruled that the day planners "are properly classified under the 'other' subheading of 4820.10.40." *Id.* at 8a-16a.

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17. The Federal Circuit has exclusive jurisdiction over appeals from the CIT. 28 U.S.C. § 1295(a)(5).

18. Because subheading 4820.10.20 requires that articles within its scope be both "diaries" and "bound," a finding that the day planners were *either* not diaries *or* not bound would have sufficed to overturn Customs' classification.

To reach its decision, the Federal Circuit examined subheading 4820.10.20 and found that the proper statutory construction of "diaries and similar articles" required a distinction between diaries and articles similar to diaries, whereas Customs' interpretive ruling and the CIT's broad definition of "diaries" had ignored that distinction and rendered the phrase "similar articles" meaningless. The Federal Circuit correctly recognized that the CIT (and Customs) had mistakenly relied on *Baumgarten v. United States*, 49 Cust. Ct. 275 (1962), *Brooks Bros. v. United States*, 68 Cust. Ct. 91 (1972) and *Charles Scribner's Sons v. United States*, 6 Ct. Int'l Trade 168 (1983). Pet. App. 8a-11a. These cases — all decided before 1989 (and therefore pre-HTSUS) and all involving permanently bound books — considered the term "diaries" as it was used under the TSUS and predecessor tariff schedules, none of which contained the specificity found in the applicable HTSUS provisions. These prior versions of the tariff schedules failed to distinguish diaries from articles similar to diaries; thus, the CIT had relied upon decisions that never reached the issue presented in this case. "The more precise HTSUS classification scheme, which distinguishes diaries from articles similar to diaries, necessitates a more precise definition of the terms at issue." Pet. App. 11a.

In addition, the Federal Circuit concluded that the diaries were not "bound." Noting that both parties had agreed that the articles listed in subheading 4820.10.20 are books, the court applied the common meaning of the term "bound" in the context of books, *i.e.*, "means permanently secured or fastened." Pet. App. 15a. The Federal Circuit held that the CIT (and Customs) had erred in construing "bound" in a broader sense, which disregarded the word's meaning in the context of books. *Id.* Because the design and purpose of a loose-leaf binder is for its contents to be moveable and replaceable, the Federal Circuit concluded that the contents of the day planners are not permanently secured or fastened, and as a result the articles are not "bound." *Id.*

In reaching its decision, the Federal Circuit determined "that *Haggar*, and thus *Chevron* deference, does not extend to ordinary classification rulings." Pet. App. 5a. The Federal Circuit contrasted the "procedural safeguards" provided in notice-and-comment regulations with the Customs classification ruling process, which "does not involve public debate or discussion, but is confined to the specific facts of and parties to the particular transaction at issue." *Id.* at 5a-6a. In addition, informed by this Court's analogy between customs and tax matters, *see Haggar*, 526 U.S. at 394, the Court of Appeals observed that this Court has accorded deference to IRS regulations, *see Atlantic Mut. Ins. Co. v. Commissioner*, 523 U.S. 382, 389 (1998), but has not extended deference to IRS interpretive rulings. *See Commissioner v. Schleier*, 515 U.S. 323, 336 n.8 (1995) (noting that IRS interpretive rulings "do not have the force and effect of regulations" (quoting *Davis v. United States*, 495 U.S. 472, 484 (1990))). The Federal Circuit concluded that Customs classification rulings are "an even less formalized body of interpretation than IRS revenue rulings," Pet. App. 7a, and, therefore, even less worthy of *Chevron* deference.

The Government thereafter petitioned the Federal Circuit for a rehearing en banc, which petition was denied. Customs then filed its petition for a writ of certiorari to this Court, which was granted on May 30, 2000.

SUMMARY OF ARGUMENT

I. The particular Customs classification ruling at issue here received the deference that it deserved under *Chevron* and *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) — none. The Federal Circuit's decision to afford "no [*Chevron*] deference" to this Customs classification ruling is not, as the Government would suggest, an affront to this Court's jurisprudence, but instead demonstrates the Federal Circuit's complete appreciation of the underpinnings of the *Chevron* doctrine. As for *Skidmore* deference, it was not sought by the Government below, but once the Federal Circuit's analysis

demonstrated that the tariff provisions — HTSUS heading 4820 and applicable subheadings — were not ambiguous, then *Skidmore* deference, like *Chevron* deference, was unavailable and inapposite.

Mead's daily planners are not bound diaries under HTSUS subheading 4820.10.20; rather, they are articles similar to diaries under superior subheading 4820.10, properly classifiable under the basket "other" provision, subheading 4820.10.40. Customs' interpretation misconstrues two of the statutory terms, and either one of these errors is independently fatal to Customs' classification. First, it ignores the basic express statutory demarcation between "diaries" and "similar articles," and construes "diaries" alone broadly enough to encompass "similar articles." Second, Customs' construction renders superfluous the qualifier "bound" in subheading 4820.10.20 by failing to distinguish it from the superior heading, which does not include the "bound" qualifier. Customs' statutory construction is therefore unreasonable and not entitled to deference. As this Court has repeatedly held, an administrative interpretation that is contrary to clear Congressional intent is entitled to no deference under *Chevron* or *Skidmore*. *See Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139, 2146 (1999); *Dunn v. Commodity Futures Trading Comm'n*, 519 U.S. 465, 479 n.14 (1997); *John Hancock Mut. Life Ins. Co. v. Harris Trust & Savings Bank*, 510 U.S. 86, 109 (1993).

II. Customs' specific classification ruling here, even if it did not contravene Congressional intent, would still not warrant, as one of 10,000 to 15,000 ordinary classification rulings issued annually, controlling-weight deference pursuant to *Chevron*. As explained in *United States v. Haggar Apparel Co.*, 526 U.S. 380 (1999), only Customs' administrative interpretations that bear the earmarks of law are entitled to *Chevron* deference. Customs classification rulings, however, are not subject to procedural safeguards and do not create legal norms; under *Haggar*, they are not within the scope of the *Chevron* deferential

framework. Even if one were to shoehorn this ruling into the *Chevron* two-step analysis, the ruling at issue would not merit controlling weight. It would fail the first *Chevron* step, because no regulatory interpretation is called for — or authorized — by the statute, and it would fail the second step because it is unreasonable and counter to clear Congressional intent.

III. Customs classification rulings should be accorded "respect" only to the extent that they have the "power to persuade." *See Skidmore*, 323 U.S. at 140. Here, the Customs classification ruling was based upon flawed reasoning and was inconsistent with prior, contemporaneous construction of the applicable tariff provisions. The ruling therefore lacked the "power to persuade," and the Federal Circuit properly rejected it in reaching the correct classification. *See, e.g., EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991) (*overruled on other grounds by statute, see Stender v. Lucky Stores, Inc.*, No. C-88-1467, 1991 WL 354882, at *2 (N.D. Cal. Dec. 19, 1991)).

ARGUMENT

I. CUSTOMS' CLASSIFICATION RULING CONTRAVENED THE PLAIN LANGUAGE OF THE TARIFF SCHEDULES AND WAS THEREFORE ENTITLED TO NO DEFERENCE.

The Government's arguments assiduously avoid the real question before the Federal Circuit and before this Court — statutory interpretation. The Federal Circuit's decision can — and should – be affirmed without reaching the issue of deference to be accorded to classification rulings, because Customs' statutory construction of the tariff schedules violated the plain, unambiguous language of the statute. *See Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139, 2146 (1999) (no need to decide deference due to guidelines issued by EEOC and Department of Justice, because agencies' guidelines adopted "an impermissible interpretation of the ADA"); *Dunn v. Commodity Futures Trading Comm'n*, 519 U.S. 465, 479 n.14 (1997)

(declining to decide whether *Chevron* principles were applicable to CFTC's interpretation because administrative deference was improper in face of clearly expressed Congressional intent); *John Hancock Mut. Life Ins. Co. v. Harris Trust & Savings Bank*, 510 U.S. 86, 109 (1993) (no need to decide whether *Chevron* or *Skidmore* deference was due to Department of Labor interpretation that "exceeded the scope of available ambiguity" in ERISA statute).

The tariff classification for Mead's imported day planners was governed by HTSUS heading 4820 and its relevant subheadings. 19 U.S.C. § 1202. Consideration of the Government's appeal must begin (and, Mead submits, end) with a simple reading of the clear, express language of that provision:

> 4820 Registers, account books, notebooks, order books, receipt books, letter pads, memorandum pads, ***diaries and similar articles***, exercise books, blotting pads, binders (loose-leaf or other), folders, file covers, manifold business forms, interleaved carbon sets and other articles of stationery, of paper or paperboard; albums for samples or for collections and book covers (including cover boards and book jackets) of paper or paperboard:
>
> 4820.10 Registers, account books, notebooks, order books, receipt books, letter pads, memorandum pads, ***diaries and similar articles***:
>
> 4820.10.20 ***Diaries, notebooks and address books, bound;*** memorandum pads, letter pads and similar articles ..... 3.6%[19]
>
> 4820.10.40 Other 0%

19 U.S.C. § 1202 (emphasis added).

19. *See* n.2, *supra.*

General Rule of Interpretation 1 of the HTSUS provides that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes." GRI 1, 19 U.S.C. § 1202. To interpret the provision under which Mead's day planners should be classified, it is therefore necessary to begin by examining the language of heading 4820. *See Orlando Food Corp. v. United States*, 140 F.3d 1437, 1440 (Fed. Cir. 1998) (CIT erred in construing HTSUS subheadings without first addressing headings).

Heading 4820 establishes the broad category "diaries and similar articles," which is then carried into subheading 4820.10. Thereafter, "diaries and similar articles" is broken down into two separate inferior subheadings: the narrow category of "diaries, . . . bound" in subheading 4820.10.20, and the basket "other" subheading, 4820.10.40. "Bound diaries" is more narrowly drawn than "diaries and similar articles."[20] The basket "other" provision therefore necessarily captures, *inter alia*, all goods embraced by "diaries and similar articles" that are not encompassed by "bound diaries."[21]

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20. In the HTSUS, "headings are designed at the broadest coverage levels with 4-digit numerical codes (or headings) and . . . are further subdivided into narrower categories assigned two additional digits (which comprise 6-digit numerical codes or subheadings)." *What Every Member of the Trade Community Should Know About: Tariff Classification Under the Harmonized Tariff Schedule, A Basic Level Informed Compliance Publication of the U.S. Customs Service*, p.3 (Nov. 1997) (PDF version) <http://www.customs.ustreas.gov/imp-exp1/comply/htspub2.htm> (hereinafter "*Tariff Classification Under the HTSUS*"); *cf. Marcel Watch Co. v. United States*, 11 F.3d 1054, 1058 (Fed. Cir. 1993) (under predecessor schedule TSUS, "a superior heading cannot be enlarged by inferior headings indented under it but can be limited thereby" (quoting TSUS Rule 10(c)(i))).

21. The semi-colon in subheading 4820.10.20 separating "diaries, notebooks and address books, bound" from "memorandum pads, letter pads and similar articles" indicates that, in that provision, "and similar

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Customs originally classified Mead's loose-leaf day planners as articles similar to diaries, under the basket "other" provision, 4820.10.40. Opp. App. 2a. Customs' 1993 modification changed the classification from articles similar to diaries (4820.10.40) to bound diaries (4820.10.20) with the perfunctory explanation that "daily planners are generally used for daily recordkeeping and are classifiable as diaries." *Id.* at 5a. In response to Mead's protest and request for further review, Customs attempted to justify its new classification by means of two statutory constructs: (1) that the term "diaries," as used in the statute, is broad enough to encompass day planners, and (2) that the term "bound," as used in the statute, is broad enough to include a loose-leaf arrangement of pages. *Id.* Neither interpretation is permissible in view of the plain language of the statute.

Customs interpreted the word "diaries" to signify "a broader concept of diary," Pet. App. 34a, despite the clear statutory distinction drawn by the use of the phrase "diaries and similar articles." Customs looked to the Compact Edition of the Oxford English Dictionary ("OED") to justify its classification ruling that "diaries" was broad enough to encompass Mead's day planners. Definition 1, which was adopted by the Federal Circuit, Pet. App. 12a, is the narrower definition: "A daily record of events or transactions, a journal; specifically, a daily record of matters affecting the writer personally, or which come under his personal observation." Fed. Cir. JA 65. Definition 2, which Customs selected, is significantly broader: "A book prepared for keeping a daily record, or having spaces with printed dates for daily memoranda and jottings; also, applied to calendars containing daily memoranda on matters of importance to people generally, or to members of a particular profession, occupation, or pursuit." *Id.* The selected definition is too broad for the

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articles" refers only to the portion after the semi-colon. *Cf.* Pet. App. 31a (recognizing that 4820.10.20 does not cover articles similar to diaries).

statutory context of "diaries and similar articles."[22] If "diaries" includes everything covered by OED definition 2, then what is meant by "diaries *and similar articles*"? Customs' "broader concept" of "diaries" robs the phrase "and similar articles" in heading 4820 and subheading 4820.10 of any meaning. *See, e.g., INS v. Cardoza-Fonseca*, 480 U.S. 421, 430-31 (1987) (refusing to accord *Chevron* deference to agency interpretation that went against statutory language in ascribing identical meaning to two different statutory phrases).

With respect to "bound," Customs interpreted the term to describe any means "which binds pages together in a fixed order."[23] Pet. App. 46a. The additional specification "bound" in

22. This second OED definition includes "calendars." Calendars, however, are the subject of a completely different tariff classification under the HTSUS. *See* HTSUS heading 4910.00, 19 U.S.C. § 1202. The inclusion of "calendars" in the selected definition highlights the overbreadth of Customs' chosen interpretation.

23. The cornerstone of the Government's definition of "bound" is an inapposite quotation, taken out of context, from the Explanatory Notes to the Harmonized Commodity Description and Coding System ("Explanatory Notes"), which constitute an extrinsic commentary on the Harmonized Tariff System ("HS"). Congress, the Courts and Customs itself all agree that the Explanatory Notes are not binding authority. *See* H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 549 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1582; *Marubeni America Corp. v. United States*, 35 F.3d 530, 535 n.3 (Fed. Cir. 1994); T.D. 89-80, 54 Fed. Reg. 35127, 35128 (1989). The HS is the international tariff classification system upon which the HTSUS is based. *See Tariff Classification Under the HTSUS* at 2, 21. The HS includes detail only to the six-digit level — i.e., subheading 4820.10 ("diaries and similar articles"); the eight-digit level present in the HTSUS — *i.e.*, subheading 4820.10.20 ("bound diaries") — was independently drafted and added by Congress and was not part of the HS. Customs itself tells the public that the Explanatory Notes, which apply only to the HS, "are intended to be applicable at the 4-digit (heading) numerical code level, and sometimes at the 6-digit (subheading) numerical code level." *Tariff Classification Under the HTSUS* at 16. Contrary to the Government's (Cont'd)

subheading 4820.10.20 demonstrates that the more general "diaries and similar articles" in 4820.10 includes items that are not "bound," but Note 9 of HTSUS Chapter 48 specifically provides that "[h]eading 4820 does not cover loose sheets." It follows, therefore, that the pages of all articles included within the phrase "diaries and similar articles" of subheading 4820.10, must be held together in some way. The loose-leaf arrangement of Mead's day planners holds the pages in place, but not permanently. To find that such an arrangement is encompassed within the specification "bound" begs the question, what arrangement of pages (other than the loose sheets expressly excluded from the subheading) is *not* "bound"? Customs' definition renders the "bound" qualifier superfluous, and is therefore incorrect. *See Dunn*, 519 U.S. at 472 ("legislative enactments should not be construed to render their provisions mere surplusage"). The statutory context shows that the term "bound" is not intended as a qualifier to distinguish "bound" items from loose sheets. Rather, although superior subheading 4820.10 includes book and non-book articles, "bound" is only found in the narrower subheading 4820.10.20, which, both parties agree, covers only books. Pet. App. 14a-15a;

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disingenuous arguments, the Explanatory Notes are not applicable, according to Customs itself, at the eight-digit level and provide no insight into the meaning Congress intended to give to the word "bound," which only appears at the eight-digit level.

Reading the quoted language in its proper context reinforces the inapplicability of the selected portion of the Explanatory Notes. The quotation appears in an explanation of the types of articles covered by heading 4820, all of which are made of paper or paperboard. By specifying that "goods of this heading may be bound with materials other than paper . . . and have reinforcements or fittings of metal, plastics, etc.," the Harmonized System drafters were merely stating that some articles incorporating materials other than paper may fit within the heading. The Government's reliance on the Explanatory Notes as a definition of the statutory qualifier "bound" is wholly misguided and inappropriate.

see also Brief for Appellee at 12, *The Mead Corp. v. United States*, 185 F.3d 1304 (Fed. Cir. 1999) (No. 98-1569). "Bound" must therefore be construed in the context of books, as the Federal Circuit properly did, defining the term as "permanently secured or fastened." *Id.* Customs' definition is outside of this statutory context and is erroneous. *See Davis v. Michigan Dep't of Treas.*, 489 U.S. 803, 809 (1989) ("words of a statute must be read in their context").

Customs' contorted construction was incorrect and unnecessary; Customs should not have gone beyond the language of the statute to determine the classification of the loose-leaf day planners at issue. *See Marcel Watch*, 11 F.3d at 1058 ("Resort to extrinsic aids in interpreting the provisions at issue is unnecessary where, as here, the statutory language clearly and unambiguously manifests congressional intent."). "Diaries" is plainly intended to signify a narrow definition of the term, which excludes day planners, while "diaries and similar articles" signifies a "broader concept of diary," which can include Mead's day planners. The specification "bound" is plainly not intended to encompass *all* arrangements by which pages are held together, and is certainly not intended to encompass such temporary means as loose-leaf ring binders. Customs ignored the plain language of the statute, and its ruling is entitled to no deference. *See, e.g., Public Employees Ret. Sys. v. Betts*, 492 U.S. 158, 171 (1989).

II. CUSTOMS CLASSIFICATION RULINGS ARE NOT ENTITLED TO *CHEVRON* CONTROLLING-WEIGHT DEFERENCE.

Having deliberately ignored in its brief the express statutory language at issue, the Government further obscures its position by amorphously framing the issue as whether "judicial deference" is due to Customs classification rulings. Pet. Br. at (I). The Government's vague articulation obviously fails to address the varied gradations and analyses of judicial deference that this Court has established for different types of

administrative interpretations. This Court's jurisprudence may be divided into two co-existing, distinct analyses pursuant to which judges are to consider the deference, if any, merited by administrative actions: (1) *Skidmore*, under which certain types of administrative interpretations lack controlling authority, but may have the "power to persuade"; and (2) *Chevron*, under which certain types of administrative interpretations are deemed controlling authority. The vitality of both standards was confirmed this past term in *Christensen v. Harris County*, 120 S. Ct. 1655 (2000).

Once one appreciates the basic nature of Customs classification rulings, it is immediately apparent that they do not satisfy any of the prerequisites for controlling-weight deference under *Chevron*. First, Customs classification rulings lack the procedural and substantive underpinnings of lawmaking and, therefore, do not even qualify for analysis under the *Chevron* framework. *See Christensen*, 120 S. Ct. at 1662-63; *cf. Haggar*, 526 U.S. at 388-90 (applying *Chevron* analysis to Customs regulations published for notice-and-comment in Federal Register). Second, even in the context of *Chevron*'s analytic framework, the ruling before the Court fails both steps of the *Chevron* analysis, *see Chevron*, 467 U.S. at 842, and would therefore not qualify for controlling-weight deference.

A. *Chevron*'s Applicability Is Limited To Administrative Interpretations That Are Endowed With The Substantive And Procedural Underpinnings of Lawmaking.

Examining classification rulings in light of *Skidmore*, *Chevron*, *Christensen* and *Haggar* (the Court's only decision addressing deference to Customs classification interpretations) leads to the inevitable conclusion that Customs classification rulings are *never* within the scope of *Chevron* and are never entitled to controlling-weight deference, although under certain

circumstances, some classification rulings — but not the one before the Court — *may* be entitled to *Skidmore* deference.[24]

In *Skidmore*, the Court held that interpretative bulletins and informal rulings issued by the Administrator of the Wage and Hour Division lacked the procedural and substantive authority of controlling precedent, 323 U.S. at 139, and were therefore entitled not to preemptive deference, but to "respect" to the extent that they possessed the "power to persuade." *Id.* at 140. The Court enumerated certain factors to be considered in determining the weight that a court should give to such administrative interpretations: "the thoroughness evident in [the ruling's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *Id.*

In 1984, the Court announced an additional approach to administrative deference in *Chevron*.[25] There, the Court addressed the deference to be accorded to regulations promulgated by the Environmental Protection Agency ("EPA") pursuant to the Administrative Procedure Act ("APA"). Substantively, the Court held that the EPA regulations were entitled not merely to the "respect" accorded under *Skidmore*, but to "controlling weight." *Chevron*, 467 U.S. at 844. Procedurally, the Court established a two-step analysis for

24. The application of *Skidmore* deference principles to classification rulings is discussed in Argument III, *infra* at 37-42.

25. Since the publication of *Chevron*, commentators have observed a state of flux in the law as to the continuing validity of *Skidmore* in the wake of *Chevron*. Some commentators, including one Justice of the Court – have posited that *Chevron* sounded the death knell for *Skidmore*. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511. As this Court's jurisprudence makes clear, however, *Skidmore* still thrives as the appropriate "deferential" analysis for administrative interpretations that are not sufficiently formal for the *Chevron* framework. *See Christensen*, 120 S. Ct. at 1663, discussed *infra* at 25-27 and n.27.

determining whether to give controlling weight to an administrative interpretation: In the first step, a court must determine whether Congress has spoken on the matter "interpreted" by the agency, *i.e.*, whether Congress has left a gap or ambiguity with the delegation for the agency to fill or resolve it. *Id.* at 843-44. Only "if the statute is silent or ambiguous with respect to the specific issue" does the court move to the second *Chevron* step of determining whether the interpretation is "a permissible construction of the statute." *Id.* at 843. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43.

Skidmore and *Chevron* define the spectrum of judicial deference, if any, available to an administrative interpretation of law.[26] *Christensen*, the Court's recent decision holding that the *Chevron* framework was not applicable to a Department of Labor opinion letter, highlights the contrast between formal administrative interpretations, which are entitled to controlling weight, and informal interpretations, which are not:

> Here, . . . we confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters — like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law — do not warrant *Chevron*-style deference. *See, e.g.*, *Reno v. Koray*, 515 U.S. 50, 61, 115 S. Ct. 2021, 132 L. Ed. 2d 46 (1995) (internal agency

26. Of course, if the administrative interpretation is counter to Congressional intent, *no* deference is required. *See* Argument I, *supra* at 16-22; *see also Morton v. Ruiz*, 415 U.S. 233, 237 (1974) ("In order for an agency interpretation to be granted deference, it must be consistent with the congressional purpose.").

guideline, which is not "subject to the rigors of the Administrative Procedur[e] Act, including public notice and comment," entitled only to "some deference" (internal quotation marks omitted)); *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 256-258, 111 S. Ct. 1227, 113 L. Ed. 2d 274 (1991) (interpretative guidelines do not receive *Chevron* deference); *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 157, 111 S. Ct. 1171, 113 L. Ed. 2d 117 (1991) (interpretative rules and enforcement guidelines are "not entitled to the same deference as norms that derive from the exercise of the Secretary's delegated lawmaking powers"). *See generally* 1 K. Davis & R. Pierce, *Administrative Law Treatise* § 3.5 (3d ed. 1994). Instead, interpretations contained in formats such as opinion letters are "entitled to respect" under our decision in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124 (1944), but only to the extent that those interpretations have the "power to persuade."

Christensen, 120 S. Ct. at 1662-63.[27]

27. The Government has gone to great lengths to contort *Christensen*'s holding to distinguish Customs classification rulings from the category of administrative interpretations excluded from the scope of *Chevron*, Pet. Br. at 27-29 & nn.14-15, and has come up with the theory that the decision to apply the *Chevron* deferential framework hinges solely on whether the format of the agency interpretation was authorized by Congress. This reading ignores the broader concepts in the Court's reasoning, and requires a strained reading of the Court's citation to Davis (1 Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 3.5, at 120 (3d ed. 1994)). *Christensen* makes clear that *Chevron* applies only to those agency interpretations that most closely resemble formal lawmaking. Davis § 3.5 sets forth a comprehensive listing of the types of administrative determinations that are and are not subject to *Chevron* deference. Legislative regulations (Cont'd)

This Court's decision in *Haggar*, holding that Customs Federal Register notice-and-comment *regulations* fit into the *Chevron* analytical framework, illustrates the stark contrast between Customs' deliberative notice-and-comment regulations and the less formal, less reasoned classification rulings that it issues 10,000 to 15,000 times a year. Despite the Government's misleading suggestions to the contrary, *Haggar* is the only case decided by this Court involving deference to Customs classification interpretations,[28] and was expressly limited to

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— resembling statutes — and formal agency adjudications — resembling judicial determinations — are within the scope of *Chevron*, while interpretive rules, agency guidelines and opinion letters — none of which resemble formal lawmaking in either form or substance — are not within the scope of *Chevron*. Davis § 3.5. As Customs' own regulations make clear, Customs rulings are equivalent to opinion letters, *see* 19 C.F.R. § 177.1(d)(1), and are therefore outside the scope of *Chevron*. *See Christensen*, 120 S. Ct. at 1662-63.

28. By neglecting to provide any description of the facts of the cited cases and by taking quotations out of context, the Government misleadingly references several decisions for the erroneous proposition that there is precedent for according controlling-weight deference to Customs classification rulings. Perusal of the cases, however, demonstrates that no such precedent exists. The Government relies heavily on *Zenith Radio Corp. v. United States*, but *Zenith*, decided six years before *Chevron*, gave "considerable weight" (not controlling weight) to the Secretary of Treasury's "longstanding and consistent administrative interpretation" of the countervailing-duty statute. 437 U.S. 443, 450 (1978). Applying the *Skidmore* factors (without expressly citing *Skidmore*), the Court found the Secretary's interpretation entitled to "peculiar weight" as a "contemporaneous construction" that had been consistently applied for nearly 80 years. *Id.* A year after the *Zenith* case was published, Congress codified the special judicial deference due to countervailing-duty determinations, *see* 19 U.S.C. § 1516a(b), and noted in the legislative history that "countervailing duty determinations, *unlike traditional value and classification decisions*, are not subject to *de novo* review." S. Rep. No. 96-249, 96th Cong., 1st Sess. 251 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381 (emphasis added). *Zenith* is inapposite in the realm of classification rulings. (Cont'd)

Customs classification regulations published for notice-and-comment in the Federal Register. 526 U.S. at 386. The focus of

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The Government's reference to *United States v. Vowell*, 9 U.S. (5 Cranch) 368, 372 (1809), is similarly misguided. Contrary to the implication of the quote, which the Government has taken out of context, there the Court reversed Customs' accrual of duties (not a classification) in a manner inconsistent with Customs' usual practice. The Court did not defer to Customs; rather, it stated that had the law been unclear, it still would have reversed Customs because of the inconsistency with its usual practice. *Id.* Rather than supporting the Government's claim to *Chevron* deference, *Vowell* supports the application of *Skidmore*'s consistency factor when deciding whether to defer to a Customs decision.

A more appropriate account of this Court's views on classification rulings is found in *United States v. Stone & Downer Co.*, 274 U.S. 225 (1927), which was not cited by the Government. There, the Court noted the extremely limited applicability of classification rulings, and held that the doctrine of *res judicata* would not be applicable to classification determinations, except with respect to identical importations. *Id.* at 235-37. This principle has been incorporated into the regulations governing Customs classification rulings. 19 C.F.R. § 177.9(c).

The Government also argues that the Federal Circuit has traditionally accorded deference to Customs' interpretive rulings and regulations, citing *Guess? Inc. v. United States*, 944 F.2d 855, 858 (Fed. Cir. 1991) (giving *Chevron* deference to Customs regulation concerning statutory exemption from duty); *Generra Sportswear Co. v. United States*, 905 F.2d 377, 379 (Fed. Cir. 1990) (giving *Chevron* deference to Customs' appraisal of quota charges paid by an importer); *Mitsui Foods, Inc. v. United States*, 867 F.2d 1401, 1403 & n.3 (Fed. Cir. 1989) (giving "substantial weight" to Customs interpretation of tariff rate quota provision). Pet. Br. at 21. Had the Government provided any information about the cases it blithely cited, it would be apparent that in none did the Federal Circuit give deference to a *classification* ruling. The cited cases only demonstrate (i) that the Federal Circuit recognizes this Court's directives concerning judicial deference to administrative interpretations, and (ii) that it also understands the fundamental differences distinguishing classification rulings from other types of administrative interpretations in applying a deference analysis.

the dispute was whether permapressing in Mexico constituted an added process in addition to assembly or an "operatio[n] incidental to the assembly process" under subheading 9802.00.80 of the HTSUS, 19 U.S.C. § 1202. The regulation in question, 19 C.F.R. § 10.16(c), expressly provided that permapressing operations were deemed to be an additional operation, thus not incidental to the assembly process. Consistent with the regulation, Customs issued classification ruling HQ 819794 (Oct. 10, 1986), in which it ruled that the Mexican permapressing operations were steps in addition to assembly, thus disqualifying the importer from a duty exemption. The CIT and the Federal Circuit both declined to give controlling weight to the regulation. Neither of those courts, nor this Court, was asked to give deference to the corresponding classification ruling.

On appeal, this Court held that the regulations fit within the "usual rule" that administrative notice-and-comment regulations are within the *Chevron* deferential framework.[29] *Id.* at 390. The Customs classification regulations were to be accorded the force and effect of law, as the Court explained, because of their close resemblance — procedurally and substantively — to legislation. It is precisely the recognition of this delegated lawmaking function that is at the heart of this Court's jurisprudence concerning the scope of *Chevron*. *See, e.g., Martin v. Occupational Safety Health Review Comm'n*, 499 U.S. 144, 157 (1991) (distinguishing less formal legal interpretations entitled to *Skidmore* respect from "norms that derive from the exercise of the Secretary's delegated lawmaking powers"). Indeed, it was the delegation of lawmaking authority exercised in accordance with rigorous procedural

29. This Court ended its inquiry at *Chevron's* first step, determining that the statute was ambiguous; it remanded for a determination on the second *Chevron* step. *Haggar*, 526 U.S. at 395. On remand, the Federal Circuit found the regulation reasonable and entitled to deference. *Haggar Apparel Co. v. United States*, No. 97-1002, 2000 WL 1035747, at *5 (Fed. Cir. July 27, 2000).

safeguards — which is absent from the classification rulings at issue here and the classification ruling that was not before the Court in *Haggar* — that warranted *Chevron* deference for the Customs regulations in *Haggar*.

B. In Contrast to the Notice-And-Comment Regulations In *Haggar*, Customs Classification Rulings Are Not Within The Scope Of *Chevron*.

The Court in *Haggar* noted that the Customs regulation at issue was adopted "upon approval by the Treasury Department, after notice-and-comment rulemaking," 526 U.S. at 386, and concluded that adherence to the *Chevron* framework was warranted "in light of the fact that the agency utilized the notice-and-comment rulemaking process before issuing the regulations." *Id.* at 390; *accord Christensen*, 120 S. Ct. at 1662 (administrative interpretation "not . . . arrived at after, for example, a formal adjudication or notice-and-comment rulemaking" lacked force and effect of law and was not subject to *Chevron* deference); *Reno v. Koray*, 515 U.S. 50, 61 (1995) (noting that internal agency guideline is entitled to less deference than published regulations subject to rigors of APA, including notice-and-comment); *see also Morton*, 415 U.S. at 232 (APA procedures are a prerequisite to deference because "administrative policies affecting individual rights and obligations [should] be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished *ad hoc* determinations"). In contrast to the regulations considered in *Haggar*, ordinary Customs classification rulings are not subject to notice-and-comment publication in the Federal Register; nor are they reached through formal adjudication.[30]

30. The procedural system pursuant to which the classification rulings are issued is antithetical to the notion that they should be cloaked with the force and effect of law. Between 10,000 and 15,000 classification rulings are issued each year, potentially from 45 ports of entry. *See supra* at 5. Those rulings are generally — not surprisingly — (Cont'd)

Substantively, the *Haggar* regulation was entitled to *Chevron* deference because it filled the role of a statute, creating a generally applicable, purely legal norm:

> Valid regulations establish legal norms. Courts can give them proper effect even while applying the law to newfound facts, just as any court conducting a trial in the first instance must conform its rulings to controlling statutes, rules, and judicial precedents.

526 U.S. at 391. A Customs classification ruling — unlike a valid regulation — does not create a legal norm. Instead, it "interprets and applies the provisions of the Customs and related laws [*i.e.*, legal norms] to a specific set of facts." 19 C.F.R. § 177.1(d)(1). As noted above, in *Haggar* the Government conspicuously omitted any reference to the ruling that applied the regulation at issue there. *See* Brief for Appellant, *Haggar Apparel Co. v. United States*, 127 F.3d 1460 (Fed. Cir. 1997) (No. 97-1002). This omission — understandable, considering that classification rulings lack all of the qualities that make Customs notice-and-comment regulations fit within the *Chevron* framework — is regrettable, as it deprived the Court there of the opportunity to observe the distinction between the regulation, which created the law, and the ruling, which merely applied it.

In this case, the classification ruling for which the Government seeks deference typifies the application function of a Customs classification ruling. Customs did not consider the meaning of "bound diaries" and "diaries and similar articles" independently to determine a generally applicable norm of law

(Cont'd)
quite perfunctory, offering little if any reasoning to explain Customs' classification determination. *See, e.g.*, HQ 953126 (Jan. 11, 1993) (Opp. App. 5a). The protest process is similarly perfunctory, requiring only a limited statement of the importer's position, no opportunity for adversary proceedings, and the possibility that Customs will simply refuse even to grant "further review" when it is requested. *See* 19 C.F.R. §§ 174.12, 174.13, 174.26; *see discussion supra* at 5-7.

before applying that legal interpretation to the Mead day planners. Rather, it used the day planners to find its desired interpretation of the statute. *See generally* HQ 955937 (Oct. 21, 1994) (Pet. App. 28a-47a). Where the statutory term is not ambiguous, *see* discussion *supra* at 16-22, it is impossible to separate the legal issue of the tariff term's meaning from the factual question of whether the imported item is within its scope.[31]

Congress has instructed the CIT to review Customs classification decisions *de novo*, *see* 28 U.S.C. § 2640(a), and the CIT has repeatedly refused to accord controlling-weight deference to classification rulings. *See, e.g., Sulzer Escher Wyss, Inc. v. United States*, 17 Ct. Int'l Trade 609, 612 n.6 (1993) ("Deference to Customs' statutory interpretation in this [tariff classification] context would violate the statutory scheme and decades of practice."). Although Congress has certainly been aware of the CIT decisions, and has had opportunities to alter the statutory *de novo* review, it has never seen fit to do so. *See, e.g.*, Customs Modernization Act of 1993, Pub. L. No. 103-182, 107 Stat. 2057 (adopting substantial changes to customs laws, without altering *de novo* review of classification determinations). This Court acknowledged and expressly preserved that *de novo* review in *Haggar*. 526 U.S. at 391 ("Deference can be given to the regulations without impairing the authority of the court to make factual determinations, *and to apply those determinations to the law, de novo*.") (emphasis

31. The Federal Circuit noted that "the analysis of whether the trial court properly classified the goods *collapses into* a determination of the proper meaning and scope of the HTSUS terms." Pet. App. 4a (emphasis added). The Federal Circuit was correct in observing that the factual and legal aspects of the classification are inseparable, but Mead disagrees with the court's conclusion that the question therefore becomes one exclusively of law. *See Miller v. Fenton*, 474 U.S. 104, 113-14 (1985) (discussing difficulty of labelling issue as question of fact or law where "the relevant legal principle can be given meaning only through its application to the particular circumstances of a case").

added). If controlling weight is given to Customs' *applications of law to fact*, then the importer's statutory right to such broad judicial review becomes illusory. As former Chief Judge Re of the CIT has pointed out, "Congress expressly provided for judicial review," and the Court must settle upon a standard that will "reflect the distinction between meaningful judicial review and the mere appearance, without the reality, of judicial review." Chief Judge Edward D. Re, *Litigation Before the United States Court of International Trade*, 19 U.S.C.A. §§ 1-1550, at LVI (West 1999).[32]

C. The Specific Customs Classification Ruling At Issue Does Not Qualify For *Chevron* Deference.

In *Haggar*, the Court not only determined that the regulation came within Congress's general delegation to "establish and promulgate such rules and regulations not inconsistent with the law . . . as may be necessary to secure a just, impartial and uniform appraisement of imported merchandise and the classification and assessment of duties . . . ," 526 U.S. at 387 (quoting 19 U.S.C. § 1502(a)), but it also looked to the specific statutory gap that the regulation filled. The relevant statute referred to "operations incidental to the assembly process such as cleaning, lubricating and painting," subheading 9802.00.80, HTSUS, 19 U.S.C. § 1202, and the regulation provided a detailed definition of "operations not considered incidental to the assembly process," 19 C.F.R. § 10.16(c) (1998). The Court found that the first step of the *Chevron* analysis was satisfied because the statute, by its own terms, directed Customs to "use its discretion to determine how best to implement the [statute's] policy in those cases not covered by the statute's specific terms." 526 U.S. at 393. *Accord Chevron* at 845 (deference premised

32. Contrary to the self-serving implication of the Government's selective quotation in its argument, Pet. Br. at 21, Judge Re's commentary reflects that classification rulings are properly analyzed under the rubric of *Skidmore* "power to persuade," not the *Chevron* deferential framework. Re at LVI and n. 269.

on theory that administrative interpretation "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute" (quoting *United States v. Shimer*, 367 U.S. 374, 382 (1961))); *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 696 (1991) (holding *Chevron* deference applicable "[w]hen Congress, through express delegation or the introduction of an interpretive gap in the statutory structure, has delegated policy-making authority to an administrative agency"); *Martin*, 499 U.S. at 151 (agency's interpretive lawmaking power derives from "agency's unique expertise and policymaking prerogatives"); Davis, *supra*, § 3.3 at 113 (noting that *Chevron* deference is restricted to "policy disputes within the scope of authority Congress has delegated an agency").

The delegation to Customs with respect to classification rulings, in contrast, lacks the depth and breadth to bestow controlling-weight deference upon its classification rulings. First, the delegating provision cited in *Haggar*, and heavily relied upon here by the Government, does not confer the same authority for the issuance of classification rulings as it does for the promulgation of procedural regulations relating to the issuance of classification rulings. *See* 19 U.S.C. § 1502(a). Section 1502(a) provides that "[t]he Secretary of the Treasury shall establish and promulgate such rules and regulations not inconsistent with the law (*including regulations establishing procedures for the issuance of binding rulings*[33] prior to the entry of the merchandise concerned)" (emphasis added).

33. "Binding rulings" are, according to Customs' own regulations, binding only on Customs itself and the specific importer and merchandise involved in the particular transaction. *See* 19 C.F.R. § 177.9(c). Contrary to the Government's implication, the inclusion of the term "binding ruling" in § 1502(a) does not reflect congressional intent to heighten the power of Customs by endowing classification rulings with the force of law; rather, the intent was to "provide greater certainty to *importers*." H.R. Rep. No. 103-361 (I), 103rd Cong., 1st Sess. 138 (1993), *reprinted in* 1993 U.S.C.C.A.N. 2552, 2688 (emphasis added).

The ruling before the Court is not a regulation establishing procedures for classification rulings, but a classification ruling itself, and 19 U.S.C. § 1502(a) does *not* provide the authority that the Government claims.[34]

Second, looking at the statutory scheme under which Customs classifies goods, it is clear that Congress has not delegated any discretionary policymaking authority to Customs.[35] Rather, the provisions of the HTSUS tariff schedules are designed to direct a Customs officer to a single, "correct" classification.[36] The HTSUS General Rules of Interpretation

34. The Government's quotation of the statute in its argument is deceptively elliptical, claiming that "Congress has authorized the agency to adopt such 'binding rulings prior to the entry of the merchandise'." Pet. Br. at 19. Contrary to the Government's disingenuous suggestion, it is the procedural regulations, not the rulings themselves, that bear the imprimatur of Congressional delegation. *See* 19 U.S.C. § 1502(a). The Government's constant references to the delegation of authority to promulgate "rules and regulations" are similarly disingenuous, as the "rules" do not refer to classification *rulings*, but, rather, are used in the APA sense of administrative procedural rulemaking (subject to notice-and-comment) as set forth in 5 U.S.C. § 553.

35. Courts have observed that the tariff schedules — as revenue statutes — "are neither remedial nor in implementation of public policy." *Anhydrides & Chemicals, Inc. v. United States*, 130 F.3d 1481, 1485 (Fed. Cir. 1997), citing *United States v. Wigglesworth*, 38 F. Cas. 595, 596-97 (C.C.D. Mass. 1842) ("Revenue statutes are in no just sense either remedial laws or laws founded upon any permanent public policy, and, therefore, are not to be liberally construed."). Accordingly, this Court has observed that, because of the revenue-generating "policy" of the tariff schedules, any doubt in their construction should be resolved in favor of the importer. *See Hartranft v. Wiegmann*, 121 U.S. 609, 616 (1887) ("But if the question were one of doubt, the doubt would be resolved in favor of the importer, as duties are never imposed on the citizen upon vague or doubtful interpretations." (quotations omitted)).

36. *See Orlando Food*, 140 F.3d at 1440-41 (after concluding that a product is classifiable under a HTSUS heading, the court looks to

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("GRI") set forth a list of instructions — a road map — to be followed in attaining the "correct" classification.[37] *See generally*, GRI 1-6, HTSUS, 19 U.S.C. § 1202. There is no room for discretion or policy judgment under the GRI; instead, Customs is told exactly what to do in the case of any questions or seemingly gray areas.

Third, looking more precisely at HTSUS heading 4820 and its relevant subheadings, there is no ambiguity nor gap to be filled. *See* Argument I, *supra* at 16-22. Customs' efforts to create an ambiguity by probing for alternative dictionary definitions cannot controvert the clarity of the tariff provisions in their statutory context. *See Brown v. Gardner*, 513 U.S. 115, 118 (1994) ("[a]mbiguity is a creature not of definitional possibilities but of statutory context"). In the absence of any statutory "gap" to fill, the classification ruling is not subject to *Chevron* controlling-weight deference. *See Betts*, 492 U.S. at 171 (refusing to accord deference to ADEA interpretive regulation, because "of course, no deference is due to agency interpretations at odds with the plain language of the statute itself"); *Brown*, 513 U.S. at 122 (fact that Department of Veterans Affairs regulation "flies against the plain language of the statutory text exempts courts from any obligation to defer to it."). *Chevron* analysis of the ruling at issue would, therefore, never reach the second step of examining whether the interpretation represented a reasonable construction of the statute. Similarly, the ruling

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subheadings for the "correct" classification); *cf.* 28 U.S.C. § 2643(b) (providing for retrial or rehearing in the event CIT is unable to "determine the correct [classification] decision").

37. For example, GRI 3 provides detailed instructions for "[w]hen . . . for any . . . reason . . . goods are, *prima facie*, classifiable under two or more headings": In such a case, Customs officers are given detailed direction to classify under the more specific heading, or, in the case of composite goods, under the heading covering the component that gives it its essential character, or, as a last resort, under the heading which occurs last in numerical order.

would not survive the second-step reasonableness analysis for the reasons articulated in Argument I, *supra* at 16-22 and Argument III, *infra* at 37-42.

III. THE FEDERAL CIRCUIT'S JUDGMENT IS CORRECT, EVEN IF THIS CUSTOMS RULING WERE SUBJECT TO *SKIDMORE* DEFERENCE.

Declining to give controlling weight to the classification ruling before it, the Federal Circuit held that Customs had erred in classifying Mead's day planners as "bound diaries" under 4820.10.20 because the day planners were neither "bound" nor "diaries." Pet. App. 16a. If the Federal Circuit had been obligated to give any deferential consideration to the ruling, the appropriate deferential analysis would have been *Skidmore*. The Federal Circuit did not expressly examine the ruling's "power to persuade" under *Skidmore*, as the issue was not raised before it or the CIT.[38] However, because "this Court reviews judgments, not opinions," *Chevron*, 467 U.S. at 842, reversal of the Federal Circuit's decision would only be warranted if the application of *Skidmore* analysis would lead to a different result from that reached by the Federal Circuit. Observing the classification ruling under the *Skidmore* lens shows that it has no power to persuade and that the Federal Circuit's decision should be affirmed.

38. The Government never even mentioned *Skidmore* deference until it filed its Petition for Rehearing En Banc, which the Federal Circuit rejected without discussion. There, as here, the Government equivocated and avoided expressly requesting *Skidmore* deference, presumably in fear that it would compromise its already-weak claim to *Chevron* deference. Although the Government had initially claimed *Chevron* deference before the CIT, it expressly waived its deference claim while the parties' cross-motions for summary judgment were pending before the CIT. *See* Opp. Br. at 13-15, Opp. App. 11a-12a. It did not, however, alternatively seek *Skidmore* respect, nor did it raise the possibility of *Skidmore* respect in response to the Federal Circuit's request for supplemental briefing on the impact of *Haggar*. The Federal Circuit cannot, therefore, be faulted for failing expressly to address *Skidmore* deference.

Under *Skidmore*, the degree to which an administrative interpretation has the "power to persuade" depends upon "the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements." 323 U.S. at 140. Accordingly, the vast majority of Customs classification rulings would be found to lack any "power to persuade," because they are devoid of reasoning. Most classification rulings simply describe the classified item and set forth Customs' tariff determination, without any explanation of how it reached that determination. As one would expect, HQ 953126 (Jan. 11, 1993), by which Customs modified the classification of Mead's imported day planners, provides no reasoned analysis, merely observing that "multi-function looseleaf binders or daily planners are generally used for daily recordkeeping and are classifiable as diaries." (Opp. App. 5a).

The Government, clearly mindful of the deficiencies of the January 1993 ruling, relies instead upon the ruling that addressed Mead's protest and request for further review, HQ 955937 (Oct. 21, 1994) (Pet. App. 28a-47a). That ruling at least purports to engage in some analysis, however flawed it may be. As the Federal Circuit noted,[39] the analysis was faulty because it did not consider the retrospective nature of a diary in contrast to the prospective nature of the day planners,[40] Pet. App. 12a-14a,

39. Although the Federal Circuit expressly reviewed the CIT's reasoning, rather than any underlying Customs ruling, Pet. App. 4a, the CIT's reasoning tracked the reasoning set forth in HQ 955937, *compare* Pet. App. 19a-27a *with id.* at 28a-47a, so that the Federal Circuit did review the same reasoning applied by Customs. The Government's observation that the Federal Circuit did not consider Customs' reasoning, Pet. Br. at 13, is unfair — considering that the Federal Circuit had correctly held that no *Chevron* deference was necessary — and inaccurate, in view of the essential similarities in the reasoning of the CIT and Customs.

40. The Government has the *chutzpah* to accuse the Federal Circuit of failing to give appropriate weight to the common commercial use of (Cont'd)

the limited space provided for notations in the day planners, which make them unsuitable for "diary" functions, *id.* at 13a, and the common meaning of the term "bound" as used in the context of books, *id.* at 14a-15a. In addition, the Federal Circuit correctly noted that Customs had erred in relying upon *Baumgarten v. United States*, 49 Cust. Ct. 275 (1962), *Brooks Bros. v. United States*, 68 Cust. Ct. 91 (1972) and *Charles Scribner's Sons v. United States*, 6 Ct. Int'l Trade 168 (1983). *Id.* at 8a-11a, 36a-43a.[41] All three cases classified goods under earlier tariff schedules, and accordingly, *Baumgarten*, *Brooks Bros.* and *Scribner's* did not address statutory terms with the specificity of the HTSUS subheadings. In particular, the prior tariff classifications under which *Baumgarten*, *Brooks Bros.* and *Scribner's* were decided did not distinguish between diaries and articles similar to diaries, *see* discussion *supra* at 13, and, therefore, none of the cited cases provided guidance on the specific classification issue before the Court. *See* Pet. App. 8a-11a; *accord Mitsubishi Int'l Corp. v. United States*, 182 F.3d 884, 886 (Fed. Cir. 1999) (holding prior classification judgment interpreting provisions of the TSUS inapplicable because of "differing language of the more recently enacted HTSUS"). Although the court of appeals could have reversed on a finding *either* that the day planners were not "diaries" *or* that they were

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the term "diary." Pet. Br. at 13. In fact, the Federal Circuit's decision was supported by the affidavits of *nine* stationery and binding industry experts on the common commercial use of the terms "diary" and "bound." Fed. Cir. JA 98-103, 107-127.

41. The Government's assertion that the Federal Circuit never found the Customs ruling unreasonable, Pet. Br. at 36-37, is incredible, as the court of appeals considered and rejected every major premise of Customs' reasoning. It did not merely "displace[ ] the agency's reasonable interpretation . . . with another, perhaps plausible, interpretation of its own." Pet. Br. at 37. Rather, it expressly recognized the flaws in the foundations of Customs' reasoning, and only then did it topple Customs' specious conclusions and replace them with its own, well-reasoned ones. Pet. App. 8a-16a.

not "bound," the Federal Circuit found Customs' analysis untenable on *both* independent issues, establishing that the ruling was poorly reasoned in its entirety.

Customs' ruling also proves unworthy of respect because it is inconsistent with earlier agency positions,[42] *Skidmore*, 323 U.S. at 140, and particularly with Customs' contemporaneous construction of the applicable HTSUS provisions. *Cf. Zenith*, 437 U.S. at 450 (evaluating respect due to countervailing duty determination based upon consistency with construction adopted contemporaneously with enactment of statute). Here, Customs' modification of its classification of Mead's day planners was a one-hundred-and-eighty-degree reversal from its previous, contemporaneous rulings on the relevant HTSUS subheadings: In the period from 1989 — the effective date of the HTSUS — until approximately 1992, Customs classified Mead and others'

42. The Court has also found inconsistency to be a significant factor when analyzing the reasonableness of an agency interpretation under the *Chevron* framework. *See FDA v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291, 1297, 1300-01 (2000) (denied deference to agency action, influenced by the fact that agency's assertion of regulatory jurisdiction was inconsistent with its prior position); *Nationsbank v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 263 (1995) (noting that, under *Chevron* analysis, inconsistency in agency positions reduces deference to be accorded); *Bethenergy Mines*, 501 U.S. at 699 (noting, although agency position was found to be consistent over time, that "the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views"); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988) (noting that if *Chevron* analysis were applied, inconsistency of agency position would eliminate deference to Secretary's position); *Cardoza-Fonseca*, 480 U.S. at 448 n.30 (finding support for decision not to defer in inconsistency of positions BIA had taken over time). While Mead contends that the *Chevron* deferential framework is inappropriate for Customs classification rulings, and that if *Chevron* were applied, the instant ruling would fail at the first step, it should be noted that the ruling would fail on the second *Chevron* step in view of the inconsistency of Customs' historical position on the proper classification of day planners.

day planners as articles similar to diaries, but in 1992 it abruptly changed its position and began to classify the same articles as "bound diaries."[43] *See* NY 864206 (June 19, 1991) (classifying Mead's day planners as "articles similar to diaries" under 4820.10.40) (Opp. App. 1a-3a); *see also* HQ 085086 (Sept. 13, 1989) (Fed. Cir. JA 30-31); HQ 085515 (Dec. 14, 1989) (Fed. Cir. JA 32-34); HQ 950984 (Jan 27, 1992) (Fed. Cir. JA 35-36).[44]

Because of this abrupt reversal, the rulings classifying Mead's day planners under subheading 4820.10.20 are entitled to no weight under a *Skidmore* analysis. In *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 257-58 (1991) ("ARAMCO"), the Court applied the *Skidmore* analysis to the EEOC's interpretation of the extraterritorial reach of Title VII. The Court held that the EEOC's interpretation "does not fare well" and

43. The Government attempts to avoid the *Skidmore* inconsistency factor by suggesting that the reversal in its position on the Mead day planners was consistent with rulings HQ 955636 (April 6, 1994) and HQ 955637 (April 6, 1994) — both, like the Mead protest decision, issued in 1994 — classifying day planners under subheading 4820.10.20. Pet. Br. at 8. This suggestion is flatly wrong, as it ignores the earlier 1989-1992 rulings with which all of the subsequent rulings were inconsistent. Further, in HQ 955937 (Oct. 21, 1994), Customs cited a February 10, 1992 ruling in which it had classified another importer's day planners under subheading 4820.10.20 (Opp. App. 5a (citing HQ 089960 (Feb. 10, 1992))). For nearly a year, therefore, from the issuance of the 1992 ruling until the issuance of the January 1993 modification to Mead's classification, Customs simultaneously held two inconsistent positions — classifying Mead's day planners as "other" while classifying another importer's day planners as "bound diaries."

44. Another relevant ruling is HQ 089135 (Jan. 8, 1992), in which Customs found that a children's picture book loosely fastened by stitching and folding was not "bound" because "binding must comprise more than simply fastening together sheets, pages or leaves." Fed. Cir. JA 131. To Mead's knowledge, the ruling remains in effect, and is inconsistent with Customs' interpretation of "bound" in the classification ruling before the Court.

had only limited persuasive value because, besides lacking support in the statute's plain language, the interpretation contradicted the EEOC's earlier interpretations, pronounced closer to the enactment of the statute. *Id.* Like the Customs ruling before the Court, "[t]he EEOC's interpretation of the statute here thus has been neither contemporaneous with its enactment nor consistent since the statute came into law. . . . [I]t also lacks support in the plain language of the statute." *Id.* Customs' position today does not enjoy the special weight afforded to an agency's contemporaneous construction of a statute it is charged to administer. *Cf. Zenith*, 437 U.S. at 450. Indeed, as in *ARAMCO*, the Customs ruling at issue here deserves little, if any, consideration.

CONCLUSION

The Federal Circuit's judgment was correct and should be affirmed.

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No. 99-1434

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

THE MEAD CORPORATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

I. Reasonable interpretations of the customs laws contained in rulings issued by the Customs Service are entitled to deference in determining the proper tariff classification of imported goods.

1. This Court has developed and applied several distinct standards of deference for administrative actions that interpret and apply statutory provisions. The highest standard of deference applies when an agency promulgates "legislative regulations" pursuant to "an express delegation of authority * * * to elucidate a specific provision of the statute by regulation." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984). A regulation issued under an express authority to "prescribe standards" has "legislative effect" (*Batterton* v. *Francis*, 432

U.S. 416, 425 (1977)), for it represents an exercise of "delegated lawmaking powers." *Martin* v. *Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 157 (1991). When Congress has made an "explicit delegation of substantive authority" to the agency, the agency's legislative regulation is entitled "to more than mere deference or weight." *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 44 (1981) (cited in *Chevron*, 467 U.S. at 844 n.12). This Court has stated that, while it "do[es] not abdicate review in these circumstances, our task is the limited one of ensuring that the Secretary did not 'excee[d] his statutory authority' and that the regulation is not arbitrary or capricious." *Schweiker* v. *Gray Panthers*, 453 U.S. at 44 (quoting *Batterton* v. *Francis*, 432 U.S. at 426). See also *Chevron*, 467 U.S. at 844; *United States* v. *Morton*, 467 U.S. 822, 834 (1984) ("legislative" regulations have "controlling weight unless they are arbitrary, capricious, or plainly contrary to the statute").

This case, however, (like *Chevron* itself) does not involve a legislative rule. Instead, it involves an interpretive rule adopted pursuant to a general delegation of authority from Congress to the agency that has been "entrusted to administer" the statute. 467 U.S. at 844.[1] Unlike a legislative rule, which has the force of law and is therefore entitled "to more than mere deference or weight" (*Schweiker* v. *Gray Panthers*, 453 U.S. at 44), an "interpretative" rule is not itself a part of the positive law that courts apply; instead, an interpretative rule is accepted by the courts only when it "represents a reasonable interpretation" of the statute. *Chevron*, 467 U.S. at 844. See also *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 315 (1979) (distinguishing between "substantive rules" that have "the binding effect of law" and "interpretative rules" to which "deference [is] accorded"). Under this standard, the Court has long upheld "reasonable" interpretations adopted by agencies to resolve "ambiguity in a statute meant for implementation by [the] agency." *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 740-741 (1996). See, *e.g.*, *Chevron*, 467 U.S. at 844; *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978).

[1] The present case, like *Chevron*, involves a "definitional issue [that] was not squarely addressed in either the statute or its legislative history." *Chevron*, 467 U.S. at 858.

When the agency has issued an interpretation by some informal method (such as correspondence) that Congress has *not* authorized for that purpose, however, the Court has stated that the agency's pronouncement is "entitled to respect" only to the extent that it has the "power to persuade." *Christensen* v. *Harris County*, 120 S. Ct. 1655, 1663 (2000). See Pet. Br. 27-32. This latter standard is inapplicable to this case. In formally adopting "binding rulings" pursuant to 19 U.S.C. 1502(a), the Customs Service has employed the very format that Congress directed the agency to use in issuing such interpretations. When Congress has authorized the agency to adopt rules to implement and enforce the provisions of the statute, affording deference to the "reasonable interpretations" adopted by the agency in the precise manner that Congress has prescribed is necessary to "honor that congressional choice." *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 568 (1980).

Respondent errs in asserting (Resp. Br. 30-31) that only regulations that are adopted after notice and comment procedures are entitled to deference. In *Christensen*, this Court described notice-and-comment regulations merely as an "example" of agency actions for which deference is appropriate. 120 S. Ct. at 1662. Numerous decisions also afford deference to agency interpretative rulings, for which notice and comment procedures are expressly *not* required under the Administrative Procedure Act, 5 U.S.C.

553(b)(3)(A).[2] Two important examples of decisions upholding "reasonable" agency interpretative rulings are *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. at 565, and *United States* v. *Correll*, 389 U.S. 299, 306-307 (1967). Although we discuss these decisions at length in our opening brief (Pet. Br. 23-27, 31-32 & n.18), respondent has made no effort to address their reasoning or holding.[3] Indeed, these cases are

[2] See also *Nationsbank of N.C., N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 254-255, 256-257 (1995), and Pension Benefit Guaranty Corp. v. LTV Corp., 496 U.S. 633, 643-644, 647-648 (1990), both according deference to statutory interpretations embodied in informal agency adjudications.

[3] Amicus Tax Executives Institute, Inc., is wrong in contending (Am. Br. 18 & 19 n.10) that *United States* v. *Correll*, 389 U.S. at 307, upheld an interpretative regulation rather than an interpretive ruling. This Court's opinion in *Correll* cited and upheld, as "reasonable," the "Commissioner's interpretation, first expressed in a 1940 ruling, I.T. 3395, 1940-2 Cum. Bull. 64, * * * originally known as the overnight rule." 389 U.S. at 302 n.10. In deferring to the interpretation established in the Commissioner's ruling, the Court did not cite or discuss any regulation. Instead, the Court treated rulings and regulations without differentiation, noting that "Congress has delegated to the Commissioner, not to the courts, the task of prescribing 'all needful rules and regulations for the enforcement' of the Internal Revenue Code." 389 U.S. at 307 (citing 26 U.S.C. 7805(a)). The Court concluded in *Correll* that the "the Commissioner's sleep or rest rule" should be upheld because it "implement[s] the congressional mandate in [a] reasonable manner." 389 U.S. at 306-307. Following that holding, the "circuit courts have uniformly held that Revenue Rulings receive significant deference * * * ." J. Coverdale, *Court Review of Tax Regulations and Revenue Rulings in the Chevron Era*, 64 Geo. Wash. L. Rev. 35, 82 (1995). See also L. Galler, *Judicial Deference to Revenue Rulings: Reconciling Divergent Standards*, 56 Ohio St. L.J. 1037, 1094 (1995) ("non-deference is now a relic of the past").

The suggestion of Amicus Tax Executives Institute, Inc., that revenue rulings are nothing more than the "litigating positions" of the agency (Am. Br. 18) is plainly incorrect. Revenue rulings are formally adopted by the Commissioner of Internal Revenue and are issued only with the "approval of the Secretary [of the Treasury]." 26 C.F.R. 301.7805-1. See also Treas.

not even cited in respondent's brief. Under the standard applied in cases such as *Chevron*, *Milhollin*, *Correll* and *Zenith Radio*, the "binding rulings" formally adopted by the Customs Service pursuant to the authority expressly conferred on that agency should be upheld so long as they reflect a "reasonable interpretation" of the statute. *Chevron*, 467 U.S. at 844.

2. Respondent and its amici suggest that the government's position in this case proves too much, for it would require deference to every routine "classification decision" or "classification ruling" issued by the agency. Resp. Br. 27; Am. Customs and International Trade Bar Ass'n Br. 5-6. It is not the ultimate classification determination itself, however, to which deference is given. Instead, in reviewing the agency's classification determinations, courts are to defer to

Order 111-2, 1981-1 C.B. 698, 699 (delegating authority "to make the final determination" on "regulations" and "Revenue Rulings" to the Assistant Secretary of the Treasury (Tax Policy)). Revenue rulings that are promulgated by the Commissioner and approved by the Secretary under the express authority provided by 26 U.S.C. 7805(a) are a paradigmatic example of a formal interpretive rule, issued in the format prescribed by Congress, to which deference is due. See Pet. Br. 24-25 & n.11. It is only informal "rulings *not* promulgated by the Secretary" that this Court has stated are to be given little deference. *Biddle* v. *Commissioner*, 302 U.S. 573, 582 (1938) (emphasis added). The amicus further errs in suggesting (Am. Br. 5) that Revenue Rulings are not officially published. Revenue Rulings have been formally published for decades in the Cumulative Bulletin—which is widely used as the official citation for such rulings.

Under both the Tariff Act and the Internal Revenue Code, Congress has directed the Treasury to adopt not only "regulations," but also "rules" to implement the statutory schemes. 19 U.S.C. 1502(a); 26 U.S.C. 7805(a). As this Court has emphasized, deference to the rules adopted by the agency to implement these complex provisions "helps guarantee that the rules will be written by 'masters of the subject,' *United States* v. *Moore*, 95 U.S. 760, 763 (1878), who will be responsible for putting the rules into effect." *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 477 (1979).

the reasonable interpretations of law established and set forth in the agency's rulings.

Respondent's statement that 10,000 to 15,000 classification rulings are issued each year (Resp. Br. 5) drastically overstates the number of rulings that contain or set forth interpretations of law to which courts would defer. The vast number of such rulings resolve merely the application, to particular facts, of legal standards that are not in dispute.[4] Routine rulings issued at ports that apply Headquarters Rulings or other precedent without elaboration of the agency's reasoning neither contain nor purport to establish the agency's interpretation of issues of law. By contrast, the detailed and thorough Headquarters Ruling involved in this case *does* contain and establish the agency's interpretation of issues of law. See Pet. App. 28a-47a. Deference is not required for the agency's application of settled law to facts; it is instead given to "reasonable" legal interpretations of the statute set forth in the formal rulings that Congress authorized the agency to adopt. See, *e.g*, *Zenith Radio*, 437 U.S. at 450.

The agency's classification determinations are subject to review in the Court of International Trade. In such proceedings, although the agency's ultimate determination "is presumed to be correct" (28 U.S.C. 2639(a)(1)), its factual determinations are reviewed *de novo*, on a "record made before the court" (28 U.S.C. 2640(a).[5] As we noted in our

[4] As Amicus Customs and International Trade Bar Ass'n has noted (Am. Br. 2), the classification decisions issued routinely at ports of the United States upon the entry of goods ordinarily contain no discussion of legal issues.

[5] As the amici have acknowledged, 28 U.S.C. 2640(a)(1) permits "independent fact gathering" upon judicial review of customs determinations by authorizing "a trial de novo in the Court of International Trade." Amici Cargill, Inc., et al., Br. 12 (quoting H.R. Rep. No. 1235, 96th Cong., 2d Sess. 59 (1980)).

brief in the *Haggar* case (U.S. Reply Br. No. 97-2044 Br. 3-4 & n.2) the procedure for judicial review of customs determinations thus parallels the procedure for judicial review of tax determinations generally: in determining the proper amount of taxes or duties owed, the reviewing court makes *de novo* findings of fact upon a record assembled in that court; and, in applying the applicable law to those findings, the reviewing court makes an independent determination of the law. See *United States* v. *Haggar Apparel Co.*, 526 U.S. 380, 391 (1999).

Respondent and its amici are wrong in claiming (Resp. Br. 32; Am. United States Ass'n of Importers of Textiles and Apparel, et. al., Br. 3-4), that the availability of a *de novo* judicial review of facts and an independent judicial determination of the law means that the agency's legal interpretations of the statute are entitled to "no deference." This Court rejected that very contention in the *Haggar* case. The Court explained that respondent's "conclusion does not follow from the premise," for a court may give an agency's legal interpretation "proper effect even while applying the law to newfound facts, just as any court conducting a trial in the first instance must conform its rulings to controlling statutes, rules, and judicial precedents." 526 U.S. at 391.[6] The

[6] *Chevron* deference routinely applies in cases in which the court is to determine the facts *de novo* and is to make an independent determination of the applicable law. See, *e.g.*, *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. at 739-741 (damages suit in state court claiming that late payment charges were prohibited interest); *Auer* v. *Robbins*, 519 U.S. 452, 456-458 (1997) (suit for overtime pay); *United States* v. *O'Hagan*, 521 U.S. 642, 674 (1997) (criminal case).

Amici United States Ass'n of Importers of Textiles and Apparel, et al., err in contending (Am. Br. 6) that the decision in *Adams Fruit Co.* v. *Barrett*, 494 U.S. 638 (1990), requires a different conclusion. In *Adams Fruit*, the Court declined to afford *Chevron* deference to a regulation that interpreted the scope of the jurisdiction of courts in direct private actions

Court concluded in *Haggar* that "[d]eference to an agency's expertise in construing a statutory command is not inconsistent with" the court's ultimate responsibility to "reach[] a correct decision" as to the proper meaning of the statute. *Id.* at 392.

The fact that some classification rulings involve mixed questions of fact and law does not mean that the legal interpretations contained in such rulings are entitled to no deference. For example, in the present case, the agency adopted a reasonable interpretation of the statutory terms "bound" and "diary" and applied that interpretation to the facts of this case. Pet. App. 28a-47a. The fact that the agency's legal interpretation was adopted in a concrete factual context, rather than in a vacuum, does not deprive it of the "great deference" that is due "to the interpretation given the statute by the officers or agency charged with its administration." *Zenith Radio*, 437 U.S. at 450 (quoting *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965)). See also *NLRB* v. *Local Union No. 103, Int'l Assoc. of Bridge Workers*, 434 U.S. 335, 350 (1978). In the application of the complex tariff laws to the infinite variety of commercial activities, "a court that tries to chart a true course to the Act's purpose embarks upon a voyage without a compass when it disregards

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because "[a] precondition to deference under *Chevron* is a congressional delegation of administrative authority" and "[n]o such delegation" of authority to interpret the "enforcement" authority of the courts had been made to the agency in that case. *Id.* at 649, 650. The Court emphasized in *Adams Fruit*, however, that the agency's power to interpret the substantive provisions of the statute remained fully in place and that the statute "clearly envisioned, indeed expressly mandated, a role for the [agency] in administering the statute." *Id.* at 650. Even though the sole enforcement authority had been vested in the courts under that statute, the Court held that "determinations [made by the agency] within the scope of [its] delegated authority are entitled to deference." *Ibid.* That same conclusion applies directly here.

the agency's views." *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. at 568.

3. The suggestion of respondent that Congress did not intend to confer interpretive authority on the agency (Resp. Br. 35) is plainly incorrect. In specifically authorizing the agency to adopt "binding rulings" in advance of importation, Congress manifestly directed the agency to provide prospective, precedential guidance. The overlapping delegations of authority that Congress made under the Tariff Act are set forth in detail in our opening brief. Pet. Br. 19-20. In addition to authorizing the adoption of "binding rulings" (19 U.S.C. 1502(a)), Congress authorized the agency to adopt rules and regulations for "the final appraisement of merchandise" and to "fix the final classification and rate of duty applicable to such merchandise" (19 U.S.C. 1500(a), (b)). "In addition to the specific powers" conferred on the agency under these provisions, Congress further broadly empowered the agency "to make such rules and regulations as may be necessary to carry out the provisions" of the Tariff Act. 19 U.S.C. 1624.

By enacting these broad delegations of authority, Congress made clear that "[t]he Customs Service will be responsible for interpreting and applying" this statute. H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 549 (1988). Respondent's contrary contention simply ignores the broad scope of the statutory authority conferred on the agency and the clear statement of congressional intent in the legislative history. In *Haggar*, this Court concluded that the delegation provisions of the Tariff Act reflect that "Congress has authorized the agency to issue rules so that the tariff statutes may be applied to unforeseen situations and changing circumstances in a manner consistent with Congress' general intent." 526 U.S. at 392-393. By empowering the agency to promulgate "binding rulings" under the Tariff Act, Congress directed the agency to apply the customs laws to

the "limitless factual variations" (*United States* v. *Correll*, 389 U.S. at 307) that arise in modern commerce. As this Court noted in *Haggar*, this power to adopt interpretive rules was given to the agency because "Congress need not, and likely cannot, anticipate all circumstances in which [its] general policy must be given specific effect." 526 U.S. at 392.

Prior to the recent series of Federal Circuit decisions that culminated in this case, the Court of International Trade and the Federal Circuit had historically afforded deference to "reasonable" legal interpretations contained in Customs Service rulings. See Pet. Br. 21-22. In both classification and valuation cases, the Federal Circuit historically held that "Customs' interpretation" of the statute is to be accepted if it is "sufficiently reasonable" and "does not contravene any clearly discernible legislative intent." *Mitsui Foods, Inc.* v. *United States*, 867 F.2d 1401, 1403 (Fed. Cir. 1989) (classification dispute); *Generra Sportswear Co.* v. *United States*, 905 F.2d 377, 379 (Fed. Cir. 1990) (valuation dispute).[7] The contrary holding of the Federal Circuit in the present case is "inconsistent with the historical practice in customs cases" and "would thwart congressional intent." *United States* v. *Haggar Apparel Co.*, 526 U.S. at 393.

[7] Respondent acknowledges (Resp. Br. 28 n.28) that the Federal Circuit has traditionally deferred to the agency's legal interpretations in valuation disputes. Respondent erroneously claims (*ibid.*), however, that the Federal Circuit has *not* historically afforded any deference to the agency's classification rulings. In *Mitsui Foods, Inc.* v. *United States*, 867 F.2d at 1402-1403, the court expressly held that it would defer to the agency's "reasonable" interpretation in a "classification case" that presented the question whether the tariff classification of "United States pack of canned tuna" included "tuna packed in American Samoa." In that "classification case," the court of appeals quoted the standard applied by this Court in *Zenith Radio*, 437 U.S. at 450, to uphold the agency's "reasonable" interpretation of the statute. See 867 F.2d at 1403 & n.3.

4. Respondent and its amici are incorrect in stating that deference is inappropriate for the agency's "binding rulings" because they are "binding only on Customs itself and the specific importer and merchandise involved in the particular transaction." Resp. Br. 34 n.33; see also Am. Cargill, Inc., et al., Br. 9. In making that contention, respondent relies on the portion of the regulations that cautions that, because the agency's rulings are "subject to modification or revocation," other importers should not "rely on the ruling letter or assume that the principles of that ruling will be applied" to other transactions. 19 C.F.R. 177.9(c).[8] What respondent and its amici have failed to cite, however, is the very next sentence of the same regulation, which specifies that any person who wishes to rely on these rulings "may request information as to whether a previously-issued ruling letter has been modified or revoked." *Ibid.* These regulations further expressly specify that the agency's binding rulings are "precedential decisions" (19 C.F.R. 177.10(a)) and that, if the rulings have *not* been modified or revoked, they "may be cited as authority in the disposition of transactions involving the same circumstances" (19 C.F.R. 177.9(a)).

5. Respondent also errs in contending (Resp. Br. 35 n.35) that deference to the Treasury's interpretations of the customs provisions is inappropriate because any doubt as to the meaning of revenue laws should be resolved in the taxpayers' favor under the rule of lenity. That contention—based on a doctrine that has little, if any, application outside the criminal law context—overlooks numerous decisions, including in particular this Court's decision in *Zenith Radio*,

[8] The agency's regulations specify that a ruling may be modified or revoked if it is "found to be in error or not in accordance with the current views of the Customs Service" and that notice of such action will be given "to the person to whom the ruling letter was addressed" and by "publication of a notice or other statement in the Customs Bulletin." 19 C.F.R. 177.9(d)(1).

437 U.S. at 450, which upheld the agency's "reasonable" interpretation of an ambiguous provision in the statute. See also *Haggar Apparel Co.*, 526 U.S. at 393 (noting that "judicial deference" to the agency's interpretation of ambiguous customs provisions is not "inconsistent with the historical practice in customs cases").[9] This Court has, in fact, expressly rejected the contention that the rule of lenity applies in such cases. In disposing of this contention in *White* v. *United States*, 305 U.S. 281, 292 (1938), the Court emphasized that "[w]e are not impressed by the argument that, as the question here decided is doubtful, all doubts should be resolved in favor of the taxpayer."[10]

6. Binding rulings are issued by the Customs Service in advance of importation because "[i]t is in the interest of the sound administration of the Customs and related laws that

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[9] Contrary to respondent's suggestion (Resp. Br. 11), the United States did not acquiesce in the no-deference standard applied in the Federal Circuit during the period when the government was challenging that standard in the *Haggar* case. Following the issuance of this Court's decision upholding the government's position in *Haggar*, the question of deference as applied in the specific context of this case was briefed by the parties and decided by the court of appeals. The courts below did not regard the government's orderly presentation of the deference issue first to this Court in *Haggar* to represent an abandonment or waiver of the deference question in this case. To the contrary, the court of appeals understood that the question of deference relates to the judicial responsibility correctly to interpret and apply the laws.

[10] Moreover, here, as in *Reno* v. *Koray*, 515 U.S. 50, 64-65 (1995), respondent "misconstrues the doctrine" of lenity: "The rule of lenity applies only if, 'after seizing everything from which aid can be derived,' *Smith* v. *United States*, 508 U.S. 223, 239 (1993) (internal quotation marks and brackets omitted), we can make 'no more than a guess as to what Congress intended.' *Ladner* v. *United States*, 358 U.S. 169, 178 (1958)." One of the principles "from which aid can be derived" in the interpretation of statutes is the principle that deference is to be given to the reasonable interpretations of statutes by the agency that Congress has charged with enforcement responsibility. See *Zenith Radio*, 437 U.S. at 450.

persons engaging in any transaction affected by those laws fully understand the consequences of that transaction prior to its consummation." 19 C.F.R. 177.1(a)(1). As respondent acknowledges, "prudent importers" (Resp. Br. 5) will seek customs rulings in order to reduce uncertainty in their business planning. Even when importers have not themselves made such a request, binding rulings may be issued by the Customs Service on its own initiative. 19 C.F.R. 177.8(b), 177.11(a). Whether issued in response to the request of an importer or on the agency's own initiative, the rulings issued by the Headquarters Office "represent[] the official position of the Customs Service" on that issue. 19 C.F.R. 177.9(a), 177.11(b)(6).

If deference were not afforded to the agency's interpretation of these voluminous and intricate statutory provisions, both importers and the Customs Service would be left without effective guidance for a wide range of transactions. The result of the ad hoc approach adopted by the court of appeals would be expensive customs litigation and unpredictable outcomes. It is in part to avoid such wasteful and unduly expensive litigation that this Court has long concluded that when, as here, "the administrator's reading fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design," the administrative interpretation should be given "controlling weight." *Nationsbank of N.C., N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. at 257 (quoting *Chevron*, 467 U.S. at 844).

II. The Customs Service has reasonably interpreted the statutory phrase "diaries * * * bound" to include the day planners imported by respondent.

1. For the reasons detailed in our opening brief, the Customs Service has reasonably interpreted the statutory phrase "diaries * * * bound" to include the ring-bound

day planners imported by respondent: (i) terms employed in tariff provisions are to be interpreted in light of their ordinary commercial usage, and the ordinary commercial usage of the term "diary" encompasses business diaries such as respondent's day planner; and (ii) the term "bound" was defined by the Explanatory Notes of the international drafting authority to encompass materials held together with "reinforcements or fittings of metal" and thus includes the "ring-bound" diaries imported by respondent. Pet. Br. 34-36. The agency's interpretation of these statutory terms has ample support and is "'sufficiently reasonable' to be accepted by a reviewing court." *Zenith Radio*, 437 U.S. at 450 (quoting *Train* v. *Natural Resources Defense Council*, 421 U.S. 60, 75 (1975)).

2. Respondent claims, however, that, in the context in which these provisions were enacted, the statutory terms "diaries" and "bound" are so clear and unambiguous that no reasonable disagreement can arise as to their meaning. Respondent asserts that deference therefore need not be given to the agency's interpretation. Resp. Br. 16-22.

Respondent's theory is that, because the classification provision distinguishes between articles that are "diaries" (to which the tariff applies) and articles that are "similar" to diaries (to which the tariff does not apply), anything that is not within the particular, "narrower" dictionary definition of "diary" on which *respondent* relies must necessarily be something only "similar" to a "diary" and therefore not encompassed within the statutory phrase. Resp. Br. 17-19. The central premise of that contention is manifestly flawed.

In determining what a "diary" is in the tariff classification, one need not look *only* to the particular definition of the term that respondent favors. As the Customs Service explained, the statutory term "diary" has "several definitions," and one of those definitions encompasses the established commercial product known as a business "diary." The

agency concluded that this "broader concept of diary * * * reflects the common and commercial identity of these items in the marketplace." Pet. App. 34a. Since tariff provisions are properly to be interpreted in light of the commercial usage of the classification terms, the agency's interpretation reflects a reasonable elaboration of the provision.[11]

Indeed, respondent acknowledges that the term "diary" has more than one definition in common and commercial usage. Respondent claims, however, that unless its "narrower definition" of "diary" is applied, the statutory provision for articles "similar" to diaries would be rendered irrelevant. That contention was not adopted by the court of appeals and was correctly rejected by the Court of International Trade. As that court explained, "there exists a category of merchandise more remote from 'pure' diaries than the importations but still sufficiently close to be called 'similar.'" Pet. App. 24a. The court noted that several of the agency's prior rulings had involved items that "were not actually diaries" but were "similar" to diaries within the meaning of the statutory classification. *Ibid.* (referring, for example, to rulings involving "a small diary-like book entitled 'Special Occasion Book,'" used for recording names, dates and "gift ideas for special dates," and a "Car Care Planner" that contained "information related to the maintenance of a car"). As the court concluded, the term "diary"

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[11] The court of appeals correctly acknowledged that tariff terms are to be construed "according to [their] common and commercial meanings." Pet. App. 8a (citing *Simod Am. Corp.* v. *United States*, 872 F.2d 1572, 1576 (Fed. Cir. 1989)). Amicus Filofax, Inc., also acknowledges that the terms employed in tariff classifications are to be understood "in the commercial sense" (Am. Br. 19 (quoting *Norman G. Jensen, Inc.* v. *United States*, 490 F. Supp. 497, 501 (Cust. Ct. 1980)), that some dictionaries define the term "diary" to include "dated book[s] for noting future engagements" (Am. Br. 4), and that Filofax has itself labeled its business engagement books a "diary" (Am. Br. 19).

need not be interpreted in the narrow fashion proposed by respondent "out of concern that otherwise" the term "similar" to diaries "would cover nothing at all." *Ibid.*

Respondent is similarly in error in asserting that the term "bound" is so clear that it requires no interpretation. Resp. Br. 20-22. It is evident that items such as diaries may be "bound" by various methods with varying degrees of permanence. Even respondent ultimately acknowledges that the minimal requirement for being "bound" is simply that the item not be "loose sheets." *Id.* at 21. Respondent also acknowledges that the definition of the term "bound" contained in the Explanatory Notes of the international authority that drafted the Harmonized Commodity system expressly states that this term includes any item held together with reinforcements or fittings of metal—a description that applies directly to respondent's business diaries in this case. *Id.* at 20-21 n.23. See Pet. App. 45a.[12] While we agree with

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[12] Respondent misquotes a Customs Service publication in contending that the Explanatory Notes of the Harmonized Commodity Description and Coding System apply only at 4-digit or 6-digit classification levels and are not applicable "at the eight-digit level" of tariff classifications. Resp. Br. 20-21 n.23. The Customs Service publication cited by respondent actually advises the public that the Harmonized System Explanatory Notes may be "persuasive authority" and "provide guidance at the national numerical code level (i.e., *beyond the 6-digit numerical code level*) in a contracting party's tariff system." U.S. Customs Service, *Tariff Classification Under the Harmonized Tariff Schedule* 17 (Nov. 1997) (emphasis added). As the Court of International Trade explained in rejecting respondent's contention in *Pima Western, Inc.* v. *United States*, 915 F. Supp. 399, 402 n.2 (1996):

> The eight-digit level of classification is subsidiary to, not an expansion of, the six- and four-digit levels. If the Explanatory Notes offer guidance that a product should be excluded from a four-digit heading or six-digit subheading, one can properly infer that the product is excluded from the eight-digit subheading.

respondent that these Explanatory Notes are not "binding" on the Customs Service or on the courts, the agency's reliance on the explanations contained in the official definitional notes of the drafting authority cannot be regarded as unreasonable. While the Explanatory Notes are not "legally binding" on the United States, they are "generally indicative of proper interpretation of the various provisions of the [HTSUS]." H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 549 (1987). See Pet. Br. 36 n.24.

The statutory terms are thus not so clear and unambiguous that the agency's interpretation is precluded on the theory that "Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. Indeed, the court of appeals did not purport to reject the agency's interpretation on that theory. Instead, the court simply displaced the agency's reasonable interpretation of the statutory terms with another perhaps plausible interpretation of its own. By doing so, the court of appeals erred. When, as here, "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. "[T]he task for the Court of Appeals was not to interpret the statute as it thought best but rather the narrower inquiry into whether the [agency's] construction was 'sufficiently reasonable' to be accepted by a reviewing court." *Federal Election Comm'n* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 31-32, 39 (1981) (citing, *e.g.*, *Zenith Radio*, 437 U.S. at 450).

See also *NEC Electronics, Inc.* v. *United States*, 144 F.3d 788, 791 (Fed. Cir. 1998) ("[w]e cannot accept [the] argument that this Explanatory Note is only pertinent to the meaning of the six-digit subheading * * * but not the eight-digit subheading"); Pet. App. 45a (the value of the Explanatory Notes at the eight-digit level is that "they provide guidance and insight into the intent of the Harmonized System Committee when drafting the Nomenclature" used in these provisions).

3. Respondent also errs in claiming that the agency's ruling should be given no weight "because it is inconsistent with earlier agency positions." Resp. Br. 40. As respondent notes, the agency's New York field office had initially concluded in 1991 that the term "diary" did *not* encompass respondent's day planners. Resp. Br. 9, 41. Under the agency's regulations, however, the Headquarters Office may review field classification rulings. 19 C.F.R. 177.11(b)(1), 177.12(a). A ruling of the Headquarters Office upon review of a field classification determination is "the official position of the Customs Service." 19 C.F.R. 177.11(b)(6). The issue involved in the present case was first submitted for determination by the Headquarters Office in 1992. From that date forward, that Office has "consistently determined that articles similar in design and/or function to the instant merchandise are classifiable as diaries." Pet. App. 31a.[13]

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[13] Respondent incorrectly attempts to rely on three rulings of the Headquarters Office that were issued in years *prior* to 1992. As respondent ultimately acknowledges (Resp. Br. 9), those rulings involved articles such as "student agendas" and "teacher multi-purpose blank books" (*ibid.*, citing HQ 085086 (Sept. 13, 1989), 1989 WL 381276; HQ 085515 (Dec. 14, 1989); HQ 950984 (Jan. 27, 1992), 1992 WL 313509) that were not "identical" (Resp. Br. 9) to the articles involved here. Because those rulings did not involve the same articles involved here, respondent acknowledges that they do not govern the classification of the day planners involved in this case. Resp. Br. 9 (citing 19 C.F.R. 177.9(c)). For example, one of the cited rulings involved an article that consisted of a blank note pad, an address book, and a ball point pen. C.A. App. 35 (HQ 950984). The fact that the items involved in the earlier rulings are "similar" to (but meaningfully different from) the items involved in this case reflects the unavoidably close application of the statutory distinction between "diaries" and articles that are "similar" to diaries. See page 15, *supra*. The fact that such distinctions under the intricate and complex provisions of the tariff statute may at times be close does not make the agency's reasonable legal interpretations ineligible for judicial deference. See *Chevron*, 467 U.S. at 864 (noting that an agency may properly "adopt[] different definitions in different contexts").

The fact that the agency's "official position" (19 C.F.R. 177.11(b)(6)) was obtained following review of a contrary, initial field determination does not mean that the agency's thorough, considered views are not entitled to deference. When an agency's official position is altered upon mature reflection of the interpretive issues, such "change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency." *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. at 742.[14] Moreover, the process that led to the formal adoption of the agency's official position does not represent an "inconsistency"; it represents the proper functioning of the "binding ruling" program through the levels of review established in the agency's regulations. See 19 C.F.R. 177.11, 177.12. The agency's official position, as set forth in the binding rulings adopted pursuant to the authority expressly conferred on the agency by Congress, should be upheld when, as here, they establish a reasonable interpretation of the statutory text.

* * * * *

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[14] Respondent is wrong in contending (Resp. Br. 41) that, under the formulation of *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), an inconsistency between the initial views of the field office and the official view of the Headquarters Office would deprive the latter of all deference. Even if the agency's final interpretation were "inconsistent with prior agency promulgations, the thoroughness and validity of the agency's reasoning" would entitle it to deference under *Skidmore*. *Aero Mayflower Transit Co.* v. *ICC*, 711 F.2d 224, 228 n.30 (D.C. Cir. 1983). "An administrative agency is not disqualified from changing its mind; and when it does, the courts still sit in review of the administrative decision and should not approach the statutory construction issue *de novo* and without regard to the administrative understanding of the statutes." *NLRB* v. *Local Union No. 103*, 434 U.S. at 351.

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

SEPTEMBER 2000

Supreme Court, U.S.
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(7)

No. 99-1434

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UNITED STATES OF AMERICA,
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On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF *AMICUS CURIAE* OF PROFESSOR THOMAS W. MERRILL IN SUPPORT OF PETITIONER

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BRIEF *AMICUS CURIAE* OF PROFESSOR THOMAS W. MERRILL IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

Amicus curiae is a Professor of Law who has devoted much of his professional life to practicing, teaching, and writing about administrative law.[1] His scholarly interests in this regard have

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[1] Pursuant to S. Ct. R. 37.6, *amicus curiae* states that no person or entity, other than *amicus curiae*, has authored this brief, nor has any other person or entity made a monetary contribution towards its preparation or submission. Consent letters from counsel for each party have been lodged with the Clerk.

centered on when courts should give deference to administrative interpretations of statutes and in particular on seeking to understand the appropriate rationale and scope of the doctrines articulated in this Court's decisions in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).[2] This brief is submitted in the hope that it will assist the Court in its deliberations in considering the important issues presented.

INTRODUCTION AND SUMMARY OF ARGUMENT

The government's petition for certiorari in this case asks for deference to an interpretation, set forth in tariff classification rulings of the Customs Service, of the terms "diaries" and "bound" as they appear in statutory tariff schedules. The government's petition, however, does not distinguish between mandatory deference to agency interpretations of statutes, recognized in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and discretionary deference, associated with *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). After the petition was filed, but before it was granted, this Court decided *Christensen v. Harris County*, 120 S. Ct. 1655 (2000). Although the majority in *Christensen* reaffirmed the distinction between *Chevron* deference and *Skidmore* deference, concurring and dissenting opinions expressed conflicting views about the relationship between these two important doctrines. This case presents an appropriate opportunity for the Court to provide additional

[2] *See, e.g.*, Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992); Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U.L.Q. 351 (1994); Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI-KENT L. REV. 1039 (1997).

clarification about the rationale and scope of *Chevron* and *Skidmore*.

Christensen correctly perceived that *Chevron* and *Skidmore* are fundamentally different. *Chevron* is rooted in an implied delegation of interpretational authority from Congress to the agency, based on the delegation of power to act with the force of law. Because it rests on a congressional command, *Chevron* deference is mandatory where it applies. *Skidmore*, in contrast, is grounded not in a command of Congress but rather in judicial recognition of the desirability of synchronizing judicial and administrative understandings of law. *Skidmore* requires courts to consider a variety factors associated with an agency's interpretation, such as the thoroughness of its reasoning, its consistency over time, and the agency's expertise, before deciding how much weight the interpretation should be given in any context. The two doctrines perform complementary functions, and the legal system is stronger for having both doctrines than it would be if it were limited to either one or the other.

The Court has said little about which agencies are entitled to *Chevron* deference, beyond stating that they are agencies that Congress has "charged with administering" a statute. Nearly all executive units can be said to "administer" one or more statutes, however, if only in determining how to spend money or when to bring enforcement actions. A more accurate statement of the type of delegation of power that should give rise to an inference of delegated interpretational authority is that Congress has given the agency the power to bind persons outside the agency with the force of law. *See Christensen*, 120 S. Ct. at 1662. Congress must always expressly delegate the power to bind with the force of law; it cannot arise by implication. In giving the agency such power, Congress necessarily recognizes that the agency will have the final say about the meaning of law, at least

in cases where no judicial review is sought or is available. And this criterion also yields conclusions that seem to be broadly correct: agencies that are given power to prescribe legislative rules or render binding adjudications would be eligible for *Chevron* deference; agencies that do no more than award grants or initiate prosecutions would not be.

Once we determine that an agency is *Chevron*-qualified, it is equally important to follow the logic of implied delegation in identifying which types of agency interpretations are entitled to mandatory deference. Just as a delegation of power to act with the force of law in one way (say by legislative rulemaking) would not give rise to an inference that the agency has been delegated power to act with the force of law in another way (say through adjudication), so a derivative delegation of interpretational authority based on one type of primary delegation (say legislative rulemaking) should not give rise to an inference that the agency has been derivatively delegated authority to interpret in other procedural formats (say through policy statements or agency manuals).

This conclusion is reinforced by process concerns. When an agency acts in ways that bind with the force of law, affected parties have the right to participate in the development of the interpretation (under Section 553 of the Administrative Procedure Act in the case of legislative rulemaking; under APA Sections 556 and 557 or because of due process in the case of binding adjudication). Affording *Chevron* deference to agency interpretations rendered in more informal procedural formats would deprive interested persons of these participation rights, and would create an avenue for their evasion.

It follows that the dispositive question here in determining whether *Chevron* or *Skidmore* applies to tariff classification rulings is whether they are legally binding on persons outside

the Customs Service. Because the regulation that authorizes these rulings makes them binding only on agency personnel, and because these rulings are not promulgated in accordance with the notice-and-comment procedures of Section 553, tariff classification rulings should be regarded as interpretative rules, rather than legislative rules. Accordingly, the appropriate standard of deference is that delineated in *Skidmore*, not *Chevron*.

ARGUMENT

I. *CHEVRON* AND *SKIDMORE* REFLECT ALTERNATIVE DEFERENCE DOCTRINES, EACH OF WHICH PLAYS AN IMPORTANT ROLE IN ADMINISTRATIVE LAW

Last Term's decision in *Christensen* revealed divergent views among the Justices about the relationship between the Court's two leading precedents on judicial deference to agency interpretations of statutes – *Chevron* and *Skidmore*. Writing for a majority of five, Justice Thomas reasoned that an interpretation of the Fair Labor Standards Act contained in an opinion letter issued by the Department of Labor's Wage and Hour Division was not entitled to deference under *Chevron*. The majority distinguished between interpretations set forth in agency actions that have "the force of law" – specifically, those adopted through notice-and-comment rulemaking and formal adjudication – and interpretations contained in agency actions that do not have the force of law – such as opinion letters, policy statements, agency manuals, and enforcement guidelines. *Christensen*, 120 S. Ct. at 1662. Only interpretations having the force of law, the majority reasoned, are eligible for *Chevron* deference. *Id.* Interpretations that lack the force of law, such as an opinion letter, should be assessed under the discretionary

deference standard set forth in *Skidmore*, according to which agency interpretations are entitled to deference only insofar as they have "power to persuade." *Id.* at 1663.

Four Justices disagreed with the Court's understanding of the two deference doctrines. Justice Scalia argued that "*Skidmore* deference to authoritative agency views is an anachronism," brought to an end by *Chevron*. *Id.* at 1664 (Scalia, J., concurring). In his view, the only questions to be answered in determining whether *Chevron* applies are whether (1) the statute is ambiguous, (2) agency personnel responsible for administering the statute have interpreted the statute, and (3) the interpretation is "authoritative," in the sense that it represents the "official position of the agency." *Id.* at 1664 n.*. As Justice Scalia saw it, the interpretation in the opinion letter was authoritative, because it was signed by the Administrator of the Wage and Hour Division and the Solicitor General's *amicus curiae* brief on behalf of the Department of Labor had vouched that it was endorsed by the Secretary of Labor. Thus, the interpretation should have been assessed under the framework established in *Chevron*. *Id.* at 1665.[3]

Justice Breyer, dissenting on behalf of himself and Justices Ginsburg and Stevens,[4] offered a third view of the relationship between *Chevron* and *Skidmore*. Justice Breyer appeared to agree with Justice Scalia that the opinion letter was "authoritative," and for this reason was entitled to *Chevron* deference. *Id.* at 1667 (Breyer, J., dissenting). But he disagreed

[3] In extra-judicial writing, Justice Scalia has been a proponent of a broad application of the *Chevron* doctrine. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511.

[4] Although Justice Stevens did not formally join the Breyer dissent, he stated in a footnote to his own dissent "that I fully agree with Justice Breyer's comments on [*Chevron*]." *Id.* at 1667 n.2.

with the notion that *Skidmore* deference is an "anachronism." According to Justice Breyer, the majority appropriately relied on *Skidmore*, since *Chevron* had made "no relevant change" in the deference doctrine articulated in *Skidmore*. *Id.* *Chevron* had simply offered "an additional, separate legal reason for deferring to certain agency determinations, namely, that Congress had delegated to the agency the legal authority to make those determinations." *Id.* at 1667-68. Justice Breyer thus suggested that both *Chevron* and *Skidmore* were applicable and that both supported affirmance of the agency interpretation. *Id.* at 1668.[5]

The opinions in *Christensen* reveal a fundamental cleavage of views about the relationship between *Chevron* deference and *Skidmore* deference. Five Justices (the five joining Justice Thomas's majority opinion) recognize two deference doctrines, *i.e.*, *Chevron* and *Skidmore*, and believe these doctrines have distinct rationales and apply over different domains. Four Justices, in contrast, appear to be of the view that there is only one deference doctrine. Justice Scalia believes *Chevron* is the sole deference doctrine today, and that *Skidmore* deference is an "anachronism." Justice Breyer, joined on this point by Justices Ginsburg and Stevens, also appears to believe there is essentially only one deference doctrine, of which *Chevron* and *Skidmore* are simply separate manifestations.

The majority view in *Christensen* is correct both as a matter of precedent and policy, and it should be reaffirmed. The Court has on a number of occasions in the post-*Chevron* era recognized the continued existence of *Skidmore* deference as a doctrine distinct from *Chevron*. *See, e.g.*, *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 256-58 (1991) (assessing

[5] Justice Breyer, in extra-judicial writing, has been critical of aspects of the *Chevron* doctrine. *See* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 372-382 (1986).

interpretation adopted by the Equal Employment Opportunity Commission under *Skidmore* rather than *Chevron*, on the ground that the Commission lacks substantive rulemaking authority); *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998) (reserving question whether administrative interpretation of the Rehabilitation Act, which is enforced by multiple agencies, is entitled to *Chevron* deference, but affording that interpretation deference under *Skidmore*); *see also Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 136, 137-38 n.9 (1997); *Reno v. Koray*, 515 U.S. 50, 61 (1995); *Martin v. Occupational Safety and Health Review Commission*, 499 U.S. 144, 157 (1991). *Christensen*'s conclusion that *Skidmore* remains a viable legal doctrine after *Chevron* thus reflects the well-established view of the Court.

This understanding is also surely correct. *Chevron* and *Skidmore* rest on different rationales for affording deference to executive branch interpretations of ambiguous statutes. "A precondition to deference under *Chevron* is a congressional delegation of administrative authority." *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990); *see Chevron*, 467 U.S. at 843-44 (deference rests on either express or implied delegation of power to agency). This delegation, in turn, creates a presumption that Congress intended the agency, rather than the courts, to exercise primary interpretative authority under the statute. *See Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-41 (1996) (*Chevron* rests on the "presumption" that Congress meant for the agency to "possess whatever degree of discretion" statutory ambiguity allows); *Dunn v. Commodity Futures Trading Comm'n*, 519 U.S. 465, 479 n.14 (1997) (*Chevron* deference "arises out of background assumptions of congressional intent").

Under *Skidmore*, in contrast, no particular delegation of power to the agency is required before it is entitled to deference.

Justice Jackson, writing for the Court, acknowledged that Congress in that case had not delegated to any administrative agency responsibility "to determine in the first instance whether particular cases fall within or without the Act." 323 U.S. at 137. Deference under *Skidmore* is grounded not on delegated power but rather on the desirability of drawing upon the "specialized experience and broader investigations and information" available to the agency, *id.* at 139, and on the need to preserve uniformity between administrative and judicial understandings of the requirements of a national program. *Id.* at 140.[6]

Given this critical difference in the legal underpinnings of *Chevron* and *Skidmore*, the doctrines impose different degrees of constraint on the courts. *Chevron* deference, when it applies, is mandatory, in the sense that the courts must accept any agency interpretation that is consistent with the statute and is otherwise "permissible" or "reasonable." 467 U.S. at 844 (reasonable agency interpretation is given "controlling weight"). *Skidmore* deference, in contrast, rests in the sound discretion of the court. Agency interpretations under *Skidmore* are "not controlling upon the courts by reason of their authority," but rather are entitled to weight insofar as they have the "power to persuade." 323 U.S. at 140.[7]

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[6] *Chevron* relied in part on similar factors. *See* 467 U.S. at 865. But it did so in support of the conclusion that *Congress* intended to delegate primary interpretational authority to the agency, not to buttress a claim that *the Court* found the agency's decision persuasive as an exercise in interpretation. *Id.* at 865-66.

[7] One could say that *Chevron* reflects a doctrine of "statutory" deference, whereas *Skidmore* recognizes a doctrine of "common law" deference. *Cf.* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 189-207 (1998) (contrasting "statutory" and "common law" versions of the *Chevron* doctrine).

Because it rests on a command from Congress, *Chevron* deference is an all-or-nothing proposition. Either the court finds that the agency has been given primary authority to interpret a statute, in which case the agency's interpretation controls if it is reasonable, or the court finds that the answer is clear at step one, and hence must be resolved by the court *de novo*. *Skidmore*, on the other hand, views deference to agency interpretations as falling along a sliding scale. Agency interpretations get various degrees of deference, ranging from none to slight to great, depending on the court's assessment of the strength of the agency's interpretation under consideration.

Finally, *Skidmore* makes deference turn on various contextual factors surrounding the agency's interpretation, such as its thoroughness, its logic, its consistency with prior interpretations, whether it has been ratified by Congress, and the degree of expertise the agency brings to the issue. These context-specific factors play little if any role under *Chevron*. The factors cited by *Skidmore* play no role under *Chevron*'s step one, where the inquiry focuses on whether Congress has directly spoken to the issue in question. 467 U.S. at 842-43. *Skidmore*'s "persuasion" factors are relevant at most under step two of *Chevron*, but even here they appear to play a greatly diminished role. Indeed, the Court has on several occasions reaffirmed that the *Chevron* framework permits agencies to change their interpretations of statutes, provided they give adequate explanations for their revised views. *See, e.g.*, *Smiley*, 517 U.S. at 742; *Rust v. Sullivan*, 500 U.S. 173, 186-87 (1991); *Chevron*, 467 U.S. at 863-64. This is at odds with the *Skidmore* factors, which give longstanding and consistent agency interpretations greater deference than recent and fluctuating views.

Of course, there is no point in having two deference doctrines if one will do. But *Chevron* and *Skidmore* require

distinctly different inquiries and operate over a different range of issues. Moreover, it is valuable to have a doctrine of discretionary deference like *Skidmore* available as an alternative to the mandatory deference doctrine of *Chevron*.

The virtue of having two deference doctrines can be seen most clearly if (as *Christensen* suggests) *Chevron* is properly confined to a relatively narrow domain defined by the agency's exercise of power to bind persons outside the agency with the force of law. If *Chevron* deference were limited in this fashion and no other deference doctrine existed, then there would be no basis for courts to draw upon the accumulated experience of agencies in resolving interpretational questions where the agency has not spoken with the force of binding law. It would be mandatory deference or nothing.

This makes little sense. Interpreters in a variety of contexts draw upon the views of other interpretative bodies, especially when those views are well-reasoned, reflect some type of comparative advantage (such as technical expertise or greater familiarity with the legal background), have been relied upon, or have been implicitly ratified by the legislature.[8] These are precisely the types factors that *Skidmore* indicated are relevant to whether courts should defer to agency interpretations. *See* 323 U.S. at 140. Declaring *Chevron* the exclusive basis for deference would impoverish statutory interpretation by cutting courts off from considering these sources of authority, with no good justification.

A more subtle danger of having just one doctrine is that it would lead to overapplication and hence dilution of *Chevron*. Much of the debate over the scope of the *Chevron* doctrine has

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[8] *See* Merrill, *supra* note 2, 101 YALE L.J. at 1003-12 (comparing the practice of deferring to executive interpretations with the practice of deferring to legal interpretations by parallel judicial systems).

been framed as if the choice is between *Chevron* deference and no deference at all. If this were indeed the choice, then defining *Chevron*'s scope broadly would make sense for all the normative reasons articulated not only in *Chevron* but *Skidmore* as well. But *Chevron* deference is strong medicine. If, in an effort to draw upon the benefits of deference, *Chevron* were extended to any agency that has some administrative function under a statute, or to any agency interpretation of that statute no matter how informal, this would likely be perceived as forcing courts to accept agency interpretations in circumstances where such deference is inappropriate, perhaps because the interpretation was rendered without any public input or without sufficient agency deliberation. This perception, in turn, could create pressure to develop "escape valves," most likely in the form of a greatly expanded conception of the judicial role at step one. Thus, if *Chevron* were the only basis for deference, the doctrine could become very broad but very riddled with exceptions.

Recognizing two deference doctrines significantly removes the pressure to expand and then to evade mandatory deference under *Chevron*. With two doctrines, the scope of mandatory *Chevron* deference can remain relatively narrow, since many of the benefits of deference can also be obtained under the discretionary, fall-back doctrine of *Skidmore*. And if the domain of *Chevron* remains compact and centered on those circumstances in which deference is most clearly appropriate, there will be significantly less pressure to devise escape valves from mandatory deference. Hence, *Chevron* can remain undiluted.

The more difficult question is whether *Skidmore* should be the sole rubric for resolving questions of deference, as Justice Breyer appeared to suggest in his *Christensen* dissent. Discretionary deference also has its drawbacks, however.

Because discretionary deference relies upon a multi-factoral standard, it is difficult to reach agreement among courts about the degree of deference to which agency decisions are entitled. The outcome of judicial review is thus more uncertain, and this could promote additional litigation, if only for purposes of strategic delay. The judgmental nature of the inquiry also means that judicial review of questions of law would be confined largely to the courts of appeals, rather than the Supreme Court. This in turn means that it might be more difficult to secure uniformity in federal regulatory law.

In short, a mixed regime – one that deploys both mandatory and discretionary deference – is probably superior to either type of pure regime. Mandatory deference, especially if identified by relatively bright-line triggering conditions, can reduce uncertainty, eliminate incentives for strategic litigation, promote uniformity, and facilitate supervision of the lower federal courts by the Supreme Court. If the sphere of mandatory deference is closely congruent with the set of circumstances in which such deference is appropriate – a very big if – then a domain a mandatory deference complemented by a residual rule of discretionary deference may well be superior to a regime of pure discretionary deference.[9]

Recognizing that there are two deference doctrines also has important implications for the most general question presented by this case – the scope of the *Chevron* doctrine. This Court has in effect recognized three options rather than two in

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[9] The argument is similar to the case for having both *per se* rules and a rule of reason in antitrust law, *see* 7 PHILLIP E. AREEDA, ANTITRUST LAW 361-64 (1986), or having categorical rules and balancing tests under the First Amendment, *see* John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975), or indeed for having a mix of rules and standards in law more generally.

reviewing agency interpretations of statutes. Instead of deference and versus no deference, we have mandatory deference, discretionary deference, and no deference. This larger menu of options allows *Chevron* to be given a relatively narrow domain, one that captures those circumstances in which mandatory deference is most appropriate. *Skidmore* then steps into the breach and allows courts to give discretionary deference to agency interpretations outside the core area where *Chevron* holds sway. In those areas where *de novo* judicial interpretation of the law is desirable – for example in interpreting general statutes like the APA – then obviously neither *Chevron* nor *Skidmore* should apply.

II. WHICH AGENCIES, AND WHAT KINDS OF AGENCY DECISIONS, ARE ENTITLED TO *CHEVRON* DEFERENCE?

This Court has had relatively little to say about which agencies are entitled to *Chevron* deference, beyond observing that *Chevron* applies when an agency has been "charged with administering" a statute by Congress. *See, e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291, 1314 (2000); *Smiley*, 517 U.S. at 739; *Chevron*, 467 U.S. at 844, 865. The Court has also offered little guidance about what kinds of agency decisions are entitled to *Chevron* deference, once the agency has been appropriately "charged." The most authoritative statement here is that of *Christensen*, which identifies "formal adjudication and notice-and-comment rulemaking" as being the kinds of action entitled to *Chevron* deference, while indicating that agency interpretations that lack "the force of law," such as "interpretations contained in policy statements, agency manuals, and enforcement guidelines," "do not warrant *Chevron*-style deference." *Christensen*, 120 S. Ct. at 1662; *see also Metropolitan Stevedore Co.*, 521 U.S. at 137-38 n.9 (1997) (suggesting that *Chevron* deference applies to

interpretations "embodied in any regulation or similar binding pronouncement").

The question of what kinds of agency interpretations are entitled to *Chevron* deference cannot be answered without first understanding why some agencies are eligible for *Chevron* deference and some are not. In other words, it is necessary to determine what it means for an agency to be "charged with administering" a statute before we can identify those types of agency pronouncements that should be afforded mandatory deference by courts.

A. Agencies Empowered To Act with Force of Law.

Although the Court has not defined what it means for an agency to be "charged with administering" a statute, a few benchmarks have been established along the way. First, it is clear that an agency given a specific grant of rulemaking authority to interpret a particular statutory provision or to fill a specific statutory gap is an agency that has been charged with administration of the statutory provision in question. *See Chevron*, 467 U.S. at 843-44; *cf. Batterton v. Francis*, 432 U.S. 416, 424-26 (1977). Similarly, an agency that has been delegated a general power to implement a statute through legislative rulemaking is one that has been appropriately charged with administration of the statute for purposes of *Chevron*. *See United States v. O'Hagan*, 521 U.S. 642, 673 (1997) (agency given authority "to prescribe legislative rules" entitled to *Chevron* deference). On the other hand, a statutory provision that is enforced in an original judicial action is not one that the agency is "charged with administering"; the administrator here is the court. *Adams Fruit*, 494 U.S. at 649-50. And a statute that applies to all agencies, such as the APA, is not one that any particular agency is charged with

administering. *Metropolitan Stevedore Co.*, 521 U.S. at 137 n.9.

In light of these benchmarks, and *Chevron*'s foundation in the concept of delegation of powers, *Christensen* correctly identified the power to bind persons outside the agency with the "force of law" as the defining characteristic of agencies entitled to *Chevron* deference. *Christensen*, 120 S. Ct. at 1662. There are several mutually reinforcing reasons for focusing on the power to act with the force of law as the key variable in determining which agencies are entitled to mandatory deference.

First, asking whether the agency has authority act with the force of law poses a question that will always have an answer – yes or no – and serves as a meaningful basis for distinguishing agencies "charged with administering" a statute from run-of-the-mill executive units. All administrative units have certain powers inherent in their status as components of the executive branch. All executive offices have inherent authority to interpret the law when this is necessary in the performance of their functions,[10] and all executive units have authority to bind subordinate employees to instructions issued by the head of the office.[11] Given these inherent powers, virtually all units in the executive branch will occasionally render official interpretations of statutes binding on subordinate employees but not on persons outside the agency. These sorts of powers do not

[10] *See* Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1262, 1279-88 (1996); Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 46, 70-71 (1993).

[11] *See* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 593-99 (1994).

distinguish agencies "charged with administering" a statute from virtually any governmental entity.

In contrast, the authority to bind actors outside the agency with the force of law is something which Congress must always explicitly confer. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) ("The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to the limitations which that body imposes."). Only a subset of agencies are given such power, and when they are, it is usually with respect to a delimited set of issues. This understanding – that agencies can bind persons with the force of law only pursuant to an express delegation of authority from Congress – has its roots, of course, in the nondelegation doctrine. *See id.* If there were any doubt about the matter, it is resolved by Section 558(b) of the APA, which provides:

> A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.

5 U.S.C. § 558(b). Thus, in asking whether Congress has conferred power on an agency to act with the force of law, we are asking a question that readily differentiates some agencies (and some issues resolved by agencies) from other agencies.[12]

[12] This Court has occasionally suggested, most notably in *Chevron* itself, that the relevant delegation of power comes about when Congress enacts a statute that contains a gap or ambiguity. *See Chevron*, 467 U.S. at 843-44. But this cannot be correct. Any statute that entails executive branch enforcement can (and most likely does) contain gaps and ambiguities. Thus, this factor does not differentiate agencies charged with administration of statutes from other agencies. Gaps and ambiguities are relevant because every delegation of power to an agency is subject to the constraint that it must be exercised in

Second, there is a certain logic to making the power to act with the force of law the linchpin in determining whether there has been "an implicit delegation from Congress to the agency to fill in the statutory gaps." *Brown & Williamson*, 120 S. Ct. at 1314. When Congress enacts a statute that confers power on an agency to implement the statute in a way that legally binds persons outside the agency, Congress should expect that in a significant percentage of cases the agency view as to the meaning of any gap or ambiguity in the statute will prevail – it will become the law of the land. The decision to confer powers on an agency to make legally binding decisions thus represents a choice by Congress to confer the primary power of interpretation on the agency.

One cannot attribute the opposite expectation to Congress – that courts will do the gap-filling – even though Congress provides that the agency's rules will be subject to judicial review under the APA and the APA authorizes courts "to decide all relevant questions of law." 5 U.S.C. § 706. It may be that no court will ever be asked to review one of the agency's rules, or if asked, will ever reach the merits. Because the agency will necessarily become the primary interpreter by default where no judicial review takes place, it makes sense, if only in terms of preserving uniformity, to make the agency the primary interpreter in all cases.

Third, a decision to give an agency the power to act with the force of law is not likely to be undertaken without due

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accordance with law. Thus, whether an agency is acting pursuant to an express delegation of interpretational power, or pursuant to an implied delegation of interpretational power, its interpretation must fill a gap or ambiguity. If there is no gap or ambiguity, then there is either nothing to interpret, or the interpretation is contrary to statute – in which case the interpretation is invalid.

deliberation on the part of Congress. In part, this relates to the constitutional significance of the decision to delegate such powers. More pragmatically, the transfer of power to act with the force of law is serious business and is not something taken lightly by either the constitutional branches of government or the citizens who will be affected by such a transfer of power. By insisting that agencies be given the power to act with the force of law before their interpretations are entitled to mandatory deference, we thus ensure that such delegations are confined to circumstances in which Congress has made a considered judgment to confer an especially notable type of power – the power to act in a sovereign capacity – on the agency.

Finally, asking whether the agency has authority to act with the force of law generates outcomes that coincide with judicial intuitions about what sorts of agencies are entitled to *Chevron* deference. All courts agree that agencies that have general grants of legislative rulemaking authority are entitled to *Chevron* deference, and most courts have concluded that agencies that have authority to render binding adjudications are entitled to *Chevron* deference. *See, e.g., INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999) (interpretation adopted by Board of Immigration Appeals in adjudication entitled to *Chevron* deference); *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407 (1992) (interpretation reflected in order of Interstate Commerce Commission entitled to *Chevron* deference).

On the other hand, courts have "never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference." *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring). If we look to the policy justifications for deference – such as drawing upon agency expertise and assuring uniformity in interpretation of

law – this intuition makes little sense.[13] But once it is recognized that *Chevron* deference is based on a congressional delegation of authority to act with the force of law, the exclusion of prosecutorial agencies is readily explainable. Prosecutors interpret the law, but their interpretations lack binding force on persons outside the agency. Thus, prosecutors do not satisfy the basic precondition for the exercise of *Chevron* deference.

What then are the powers that Congress must confer upon an agency in order to make it eligible for *Chevron* deference? Basically, Congress must give an agency the power either to promulgate legislative rules or to render self-executing adjudicatory orders. In both contexts, the agency has been charged with authority to act with the force of law on persons outside the agency without regard to the intervention of any other governmental actor.

B. Agency Interpretations Having the Force of Law.

Having determined which agencies are entitled to *Chevron* deference, the next step is to establish what kinds of agency interpretations fall within the scope of this power. In his *Christensen* concurrence, Justice Scalia argued that any agency interpretation is entitled to *Chevron* deference as long as it is "authoritative." *Christensen*, 120 S. Ct. at 1664. He suggested that an authoritative interpretation is one that "represent[s] the official position of the expert agency." *Id.* at 1664 n.*. Justice Breyer's dissent appeared to agree with this suggestion. *Id.* at 1667.

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[13] *See* Dan M. Kahan, *Is* Chevron *Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 489-92 (1996) (urging the extension of *Chevron* deference to interpretations of federal criminal law by federal prosecutors, but acknowledging that this is contrary to existing judicial authority).

Affording *Chevron* deference to any "authoritative" interpretation, however, de-couples the scope of *Chevron* deference from the act of Congress that gives rise to the implication of delegated interpretative authority in the first place. Under Justice Scalia's suggested approach, once we determine that an agency is entitled to *Chevron* deference, for example because it has been given the power to promulgate legislative rules, it does not matter whether the agency issues its interpretation in a legislative rule. It can just as easily announce the interpretation in an interpretative rule, a policy manual, a press conference held by the agency head, or a brief filed in court.

This sweeping conception of the scope of *Chevron* authority, however, is not faithful to the logic of the *Chevron* doctrine, which rests on an implied delegation from Congress. Delegations of power to bind persons outside the agency with the force of law are strictly limited in accordance with their terms: "The grant of such a power is never to be implied." *ICC v. Cincinnati, N.O. & Tex. Pac. Rwy.*, 167 U.S. 479, 494 (1897). This understanding follows both from the nondelegation doctrine, with its requirement that every delegation be express and be constrained by an intelligible principle, *see J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928), as well as from the APA's prohibition on agencies exercising governmental power "except within jurisdiction delegated to the agency and as authorized by law." 5 U.S.C. § 558(b). Given that the primary grant of power to bind persons with the force of law cannot be expanded beyond its express terms, it follows that the derivative grant – the implied power to exercise interpretational authority – should also not be subject to expansion beyond the terms of the grant. Consequently, unless Congress has expressly directed to the contrary, *Chevron*

deference should be limited to legislative rules and adjudications that result in binding and self-executing orders.[14]

This is admittedly a more restrictive view of the scope of *Chevron* deference than is implicit in some of the Court's decisions. The Court has in a handful of cases suggested that agency action more informal than notice-and-comment rulemaking or formal adjudication may be entitled to *Chevron* deference.[15] But in none of these decisions has the Court explained how, consistent with the underlying logic of delegation, an agency should be entitled to mandatory deference when it interprets a statute in a procedural format that does not otherwise have the force of law.

Limiting the derivative grant of power to interpret to the same scope as the primary grant to bind with force of law makes sense because the two powers are functionally equivalent. Giving an agency the power to promulgate legislative rules (or to render formal adjudications), subject to judicial review to assure that the rule (or order) does not violate the statute and is not arbitrary, capricious or an abuse of

[14] This is essentially the position adopted by the Administrative Conference of the United States in 1989. *See* Administrative Conference of the United States, *Recommendation 89-5: Achieving Judicial Acceptance of Agency Statutory Interpretations*, RECOMMENDATIONS AND REPORTS 31-33 (1989). For a revised version of the report accompanying the recommendation, see Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1 (1990).

[15] *See Nationsbank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 255-57 (1995) (letter of Comptroller of Currency); *Pension Benefit Guaranty Corp. v. The LTV Corp.*, 496 U.S. 633, 647-48 (1990) (informal adjudication); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 574 (1988) (NLRB adjudication); *Young v. Community Nutrition Inst.*, 476 U.S. 974, 978-79 (1986) (no action decision of Food and Drug Administration).

discretion, *see* 5 U.S.C. § 706(2)(A), has no greater impact on regulated parties than giving the agency the power to interpret the statute, subject to judicial review to assure that the interpretation does not violate the statute and is "reasonable" or "permissible." *See Chevron*, 467 U.S. at 843-44; Duffy, *supra* note 4, at 199-203. And even if there is some gossamer distinction between the APA's arbitrary and capricious standard and *Chevron*'s step two standard – and there is little or no authority that would support such a distinction – the *effect* of judicial approval is the same in both cases: the agency's policy must be accepted and becomes binding on parties outside the agency.

The conclusion that *Chevron* deference extends only to those interpretations that reflect the exercise of an express grant of power to act with the force of law is reinforced by powerful process arguments. First, confining the scope of *Chevron* deference to legislative rules and formal adjudications preserves the right of public participation in the development of administrative interpretations of statutes. Both legislative rulemaking and formal adjudication are subject to procedural rules that ensure a significant degree of public participation before an agency may take final action. *See Christensen*, 120 S. Ct. at 1662 (recognizing this point).

With respect to legislative rules, agencies must, subject to certain exceptions,[16] comply with the notice-and-comment provisions of Section 553 of the APA (5 U.S.C. § 553). As interpreted by the courts, these provisions require public notice of a proposed agency interpretation, an opportunity to file

[16] Procedural rules are exempt from the notice-and-comment requirements, as are substantive rules if the agency finds for good cause that notice-and-comment would be "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(A), (B).

written comments on the interpretation, and a reasoned response by the agency to any comments that raise material concerns. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48-49, 56-57 (1983). Public input is thus ensured, and the agency must be responsive to that input in order to avoid a judicial remand.

Similarly, formal adjudications must comply with the hearing requirements of Section 556 and 557 of the APA (5 U.S.C. §§ 556, 557), and all adjudications that affect liberty or property interests must afford a hearing that comports with due process requirements. *See Mathews v. Eldridge*, 424 U.S. 319 (1976). These procedural requirements mean that the parties immediately affected will have an opportunity to submit some kind of brief addressing a proposed agency interpretation. Given the adversarial structure of adjudication, it will be incumbent on the agency staff to respond to criticisms that are material. And judicially-developed norms of reasoned decisionmaking compel the decision maker to provide an explanation for the agency's resolution of the issue. Again, public input is ensured, and the agency has a substantial incentive to be responsive to that input.

In contrast, other modes of announcing agency interpretations do not offer equivalent guarantees of public participation. Interpretative rules and policy statements are specifically exempt from the notice-and-comment requirements of Section 553. *See* 5 U.S.C. § 553(b)(A). Policy manuals and enforcement guidelines are similarly assumed to fall within these exemptions. Opinion letters, no action letters, and the like do not provide the same structured opportunities for participation as does formal adjudication. And of course agency press conferences, speeches by agency executives, and appellate briefs or *amicus* briefs filed in the agency's name

typically offer no established forum for public input before they are released.

Confining the scope of *Chevron* deference to legislative rulemaking and formal adjudication thus provides important assurance that interpretations entitled to mandatory deference will be open to public criticism before they are rendered, and that agencies will have incentives to be responsive to these criticisms. This correspondence between delegations to act with the force of law and the existence of rights of public participation is not, of course, accidental. General norms of democratic governance and traditions of due process both stress the importance of affording affected persons the right to be heard before they are subjected to the coercive power of the state.[17] Hence it is not surprising that the provisions of the APA, supplemented by due process considerations, afford rights of public participation when agencies are given the power to bind persons with the force of law. Limiting the scope of *Chevron* deference to interpretations rendered in legislative rules and formal adjudications preserves this important equation between the exercise of coercive governmental power and the right to be heard.

A second process concern is the danger of evasion of the procedural protections of the APA if *Chevron* deference is extended beyond legislative rules and formal adjudications. Agencies are often frustrated by the time and resources required to comply with notice-and-comment hearing procedures and the rules of formal adjudication. Yet the APA and due process law demand compliance with these procedures before agencies can take action that binds the public with the force of law. *See Chrysler Corp.*, 441 U.S. at 303.

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[17] *See generally* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1760-90 (1975).

Expanding the scope of the *Chevron* doctrine to include interpretations rendered in informal formats creates an avenue for evasion of these requirements. As noted above, a *Chevron*-certified interpretation has the same effect on the regulated community as a judicially-sustained legislative rule. The only difference is that the agency has been able to achieve this effect without going through the cumbersome notice-and-comment procedures associated with legislative rulemaking (or the procedures associated with formal adjudication). One can of course question whether the costs associated with notice-and-comment rulemaking and formal adjudication are too high given limited agency resources. But sanctioning an evasion of Sections 553 or 556 and 557 via an expanded *Chevron* doctrine is not the proper solution. If the current procedural matrix is too elaborate, then it should be relaxed across the board, or modified in accordance with some criterion that more sensibly rations scarce agency resources. The strategy of evading these requirements via an expanded *Chevron* results in complete elimination of procedural protections on a hit-or-miss basis, corresponding to no coherent design.

III. A CUSTOMS SERVICE TARIFF CLARIFICATION RULING IS ENTITLED TO *SKIDMORE* DEFERENCE, NOT *CHEVRON* DEFERENCE.

Under the foregoing principles, tariff clarification rulings issued by the Customs Service are not entitled to *Chevron* deference. Instead, these rulings should be given such weight as is appropriate under the multi-factoral analysis prescribed by *Skidmore*.

There is no doubt that the Customs Service is an agency that is entitled, in appropriate circumstances, to *Chevron* deference. Congress has delegated general authority to the Secretary of

Treasury "to issue such rules and regulations as may be necessary to carry out the provisions of this chapter." 19 U.S.C. § 1624; *see also* General Note 20 of the Harmonized Tariff Schedule of the United States, 19 U.S.C. § 1202. The clarification of ambiguities and gaps in the tariff statutes by means of legislative regulations adopted pursuant to these delegated powers is entitled to *Chevron* deference, as this Court held in *United States v. Haggar Apparel Co.*, 526 U.S. 380 (1999).

A separate provision of the tariff statutes authorizes the Secretary of Treasury to issue regulations establishing procedures for the issuance of tariff classification rulings. 19 U.S.C. §1502(a). It is possible that this statute also represents the kind of delegation of power to act with the force of law that would give rise to *Chevron* deference. The statute gives the Secretary of Treasury power to "establish and promulgate such rules and regulations not inconsistent with law" including "regulations establishing procedures for the issuance of *binding rulings* prior to the entry of the merchandise concerned." *Id.* (emphasis added). This language is broad enough to sustain the promulgation of legislative regulations or the rendering of binding adjudications establishing the appropriate classification of particular merchandise prior to entry.

However, the Customs Service has not drawn upon this grant of authority to issue legislative rules or to render binding adjudications. Pursuant to the authority granted by 19 U.S.C. § 1502(a), the Secretary has issued regulations that provide for the issuance of "ruling letters." 19 C.F.R. § 177.9(a). The regulations describe the legal effect of these ruling letters as follows:

> A ruling letter issued by the Customs Service under the provisions of this part represents the

> official position of the Customs Service with respect to the particular transaction or issue described therein and is *binding on all Customs Service personnel* in accordance with the provisions of this section until modified or revoked. In the absence of a change of practice or other modification or revocation which affects the principle of the ruling set forth in the ruling letter, that principle may be cited as authority in the disposition of transactions involving the same circumstances.

Id. (emphasis added). The regulation specifies that such rulings are "binding on all Customs Service personnel." But it does not suggest that these rulings bind private parties or courts.

It appears, therefore, that tariff classification rulings do not bind the world with the force of law the way a legislative rule does. They are binding only on agency personnel, which is characteristic of interpretative rules. Moreover, the rulings are not adopted pursuant to the notice-and-comment provisions of Section 553 of the APA, *see* Pet. App. 6a-7a, which is ordinarily a prerequisite for a valid legislative rule. Lacking the critical features of a binding legislative rule, tariff classification rulings are thus not entitled to *Chevron* deference.[18]

[18] The basis for distinguishing between legislative rules and interpretative rules has been a matter of considerable uncertainty in the lower courts. *See* Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 ADMIN. L. REV. 547 (2000). One distinction is that a legislative rule articulates a new legal norm, whereas an interpretative rule interprets an existing norm. This is evidently the distinction Justice Scalia had in mind in when he observed in *Christensen* that the rule in *Chevron* (defining the statutory term "stationary source") "in fact involved an interpretative regulation." *Christensen*, 120 S. Ct. at 1664 (Scalia, J., concurring). For purposes of deciding what kinds of agency interpretations are entitled to mandatory deference, however, two other distinguishing traits are more germane: whether the rule binds persons outside the agency with force of law, and whether the rule was adopted in accordance with the procedural requirements of the APA. *See* Pierce, *supra*, at 549-554. On both scores, the regulation in *Chevron* was legislative and hence was entitled to mandatory deference; conversely, tariff classification rulings should be categorized as interpretative, and hence are not entitled to *Chevron* deference.

It does not follow, of course, that tariff classification rulings are entitled to no deference whatever. Those rulings represent the considered view of the agency that has the greatest expertise in harmonizing the different provisions of the tariff schedules. It is especially significant that the regulations specify that tariff classification rulings may be cited as precedents "in the disposition of transactions involving the same circumstances." 19 C.F.R. § 177.9(a). *Skidmore* deference, with its emphasis on the thoroughness, consistency, and the degree of reliance associated with executive interpretations, is especially well suited to a regime that expressly treats agency interpretative rulings as precedents in similar cases.[19]

In this regard, tariff classification rulings bear a substantial resemblance to revenue rulings issued by the Internal Revenue Service. As this Court has held, revenue rulings "do not have the force and effect of regulations." *Davis v. United States*, 495 U.S. 472, 484 (1990). Revenue rulings are nevertheless entitled to "considerable weight," especially when "they involve the contemporaneous construction" of the statute or when they "have been in long use." *Id.*; *see also Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978) (applying similar analysis to Treasury ruling interpreting the Tariff Act). This is the type of deference mandated by *Skidmore*.

[19] *See* Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1472-73 (1992) (noting that interpretative rules are often treated like precedents).

In short, although the Federal Circuit was correct that tariff classifications are not entitled to *Chevron* deference, it erred in jumping to the conclusion that this meant the court was free to impose its own view of the meaning of the tariff schedules. The interpretations of the schedules reflected in the tariff classification rulings were deserving of the most respectful consideration under *Skidmore*.

Amicus takes no position on how much weight the Customs Service's tariff classification rulings in this case should be given under the *Skidmore* factors. Because the possibility of applying *Skidmore* deference appears not to have been raised sharply in the court below, see Pet. Reply Br. at 4-6, this Court may wish to consider remanding to the Federal Circuit to undertake this inquiry in the first instance.

CONCLUSION

The decision of the court of appeals should be vacated.

Respectfully submitted,

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UNITED STATES OF AMERICA,
Petitioner,

v.

THE MEAD CORPORATION,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Federal Circuit

BRIEF AMICUS CURIAE OF THE JOINT INDUSTRY GROUP, THE ALLIANCE OF AUTOMOBILE MANUFACTURERS AND THE INTERNATIONAL MASS RETAIL ASSOCIATION IN SUPPORT OF RESPONDENT'S OPPOSITION TO THE BRIEF FOR THE UNITED STATES

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BRIEF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37.3(a) on written consent of all parties, the Joint Industry Group, the Alliance of Automobile Manufacturers and the International Mass Retail Association respectfully submit this brief *amicus curiae* in support of respondent The Mead Corporation's (Mead) opposition to the Government's position in this case.[1]

INTERESTS OF *AMICUS CURIAE*

The Joint Industry Group is a coalition of over 160 companies, trade associations and businesses actively involved in international trade, which represents the interests of its members before the Customs Service, the Department of Commerce, the United States Trade Representative, other government agencies and the Congress. The members of the Alliance of Automobile Manufacturers ("Alliance") include thirteen global manufacturers of cars and light trucks. The Alliance represents the interests of its members in public policy matters, with particular emphasis on vehicle safety, the environment, and customs procedures, among other issues. The International Mass Retail Association is the world's leading alliance of retailers and their product and service suppliers, representing over 200 retail companies and 550 supplier companies before both the Federal and State governments.

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[1] This brief was not authored in whole or in part by counsel for a party to this case. No person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief. The individual members of each association included within the *amicus curiae* are listed in the Appendix.

The members of these associations either are importers or assist importers. They request thousands of rulings from the Customs Service annually and, when necessary, litigate adverse rulings in the Court of International Trade and the Court of Appeals for the Federal Circuit. The decision of the Court in this case will directly affect their decisions on whether to seek pre-importation guidance from the Customs Service on the classification of imported merchandise and other laws enforced by Customs through the administrative rulings process or, alternatively, to by-pass the rulings process entirely and rely ultimately on the courts for guidance on the construction of the tariff laws.

STATEMENT

For more than a century,[2] importers have sought guidance from the United States Customs Service on how imported products should be classified and appraised under the various tariff laws that have been enacted by Congress. The Customs Service has provided that guidance through ruling letters. These are almost always issued in response to an importer's written request[3] and, according to the procedural regulations issued by Customs, are limited to the facts presented in the request and binding only on Customs with respect to the importer who requested the ruling.[4] The importer

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2 The Customs Service has been issuing such decisions at least since 1868. U.S. Treasury Dep't, *Synopsis of Sundry Decisions Rendered by the Treasury Department under the Tariff and Other Acts*, - U.S. Gov't Printing Office (1869).

3 On occasion Customs issues rulings in response to internal inquiries from its field personnel without any notice to parties in the importing community that may be affected by the decisions therein.

4 19 C.F.R. § 177.9(a).

is also bound to follow the ruling,[5] unless and until the ruling is overturned by the courts, or revoked or modified by Customs in accordance with the procedures set forth in 19 U.S.C. § 1625(c). Rulings are issued by customs officials at ports of entry (principally, New York) and the Office of Regulations and Rulings at Customs headquarters in Washington, D.C.[6]

At present, importers make extensive use of the ruling letter procedure for obtaining Customs' current position on various issues, including the classification and appraisement of the millions of different products that enter the country. Customs also issues ruling letters on, among other things, country of origin and country of origin marking; drawback; trademarks and copyrights; the entry of merchandise; foreign trade zones; the entry and clearance of vessels, vehicles and aircraft entering and leaving the United States; customs bonds; customs brokers; vessel repairs; overtime charges; and the merchandise processing and harbor maintenance fees. Rulings on these topics vary little from rulings on classification and appraisement,[7] except for the subject matter. While classification rulings tend to be very brief,[8] simply stating the

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5 19 C.F.R. § 177.8(a)(2).

6 19 C.F.R. § 177.2(a).

7 19 U.S.C. § 1502(a), the legislative authority relied on by the Government, only mentions classification, appraisement, and the assessment of duties.

8 In 1999, Customs' field officers at the ports issued approximately 10,000 brief classification rulings, and the Office of Regulations and Rulings issued almost 600 classification rulings containing a fuller discussion and analysis of the facts and applicable law. This information was obtained through a query of Fuglei's "Customs Info" CD-ROM database, which is commercially available and widely used in the trade community. The query covered classification rulings issued in calendar year 1999.

facts and Customs' opinion as to the correct classification, some rulings from Customs headquarters do provide a fuller analysis of the facts and applicable law.[9]

The substance of a ruling letter involving classification, whether it be brief or expansive in explaining how the conclusion was reached, can, with one exception,[10] only be challenged by the importer through filing an administrative protest contesting the liquidation of an entry covering an actual importation of the product. Such a protest may be filed, however, even though the importer did not obtain a ruling. If the protest is denied by Customs, the importer may obtain judicial review of Customs' classification decision by filing a summons in the Court of International Trade.

This case presents the narrow question of whether the courts must defer under *Chevron U.S.A., Inc. v. Natural*

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9 Nearly all rulings result from an importer-initiated request and are made available electronically through the Internet on Customs' website, or through private publishers to whom Customs provides the rulings electronically. Other than revocations or modifications of existing rulings that must by law be published in the Customs Bulletin and Decisions (the Customs Service's "official" publication), these rulings are not required to be published. In fact, only seven rulings or other documents announcing Customs' position on a classification matter have appeared in that publication since 1996. Of these seven, five were published in 1996 (T.D. 96-5, T.D. 96-7, T.D. 96-24, T.D. 96-80, and General Notice: Tariff Classification of Hydraulic Mine Roof Shield Supports). Only two have been published since 1997 (C.S.D. 97-1 and General Notice: Guidance Concerning the Tariff Classification of Pharmaceutical Products Imported for Clinical Research).

10 Rulings can be challenged directly in the Court of International Trade without filing a protest upon a showing of irreparable harm. *See* 28 U.S.C. § 1581(h).

Resources Defense Council, Inc., 467 U.S. 837 (1984), to the tariff classification rulings issued by the Customs Service. The decision of this Court is likely to have broad ramifications for importers. Unless this Court continues to adhere to the "bright line" rule announced in *Chevron* and reaffirmed in *United States v. Haggar Apparel Co.*, 526 U.S. 380 (1999), and most recently in *Christensen v. Harris County*, 120 S. Ct. 1655 (2000), which limited deference to interpretive regulations promulgated under the Administrative Procedure Act,[11] the decision will inject greater uncertainty and less uniformity into the law than exist today, contrary to the Government's assertion, and will result in increased litigation and, thus, increased costs to business.

SUMMARY OF ARGUMENT

Extending *Chevron* deference to tariff classification rulings is both legally and commercially inappropriate. Applicable judicial precedent draws a clear, workable distinction between regulations, which have the force of law, and rulings, which do not. This Court's decisions emphasize that *Chevron* deference is warranted only when agencies act pursuant to a Congressional delegation of authority. In the most recent decision of this Court discussing *Chevron* deference, *Christensen v. Harris County*, this Court refused to extend *Chevron* to an agency's ruling letter. Here, where again the Government argues that this Court should give controlling weight to an agency's ruling letter, it cites 19 U.S.C. § 1502(a) as a specific Congressional delegation of authority. We submit, however, that a plain reading of the statute and its legislative history establishes that such rulings are simply another form of

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11 5 U.S.C. § 551 *et seq.*

general information on classification and appraisement that Congress has long directed should be disseminated to Customs officials at ports of entry to ensure that imported merchandise arriving at any port in the country is treated fairly and uniformly. The Government's attempt to dignify customs "binding rulings" as a form of delegated lawmaking therefore fails.

Practical and commercial considerations also militate against extending *Chevron* deference to classification rulings. First, there is no simple way to distinguish classification rulings from Customs' interpretive pronouncements in other contexts. There are many types of rulings and interpretive statements, of varying degrees of applicability and persuasiveness. Customs ruling letters themselves are "binding" in only a limited sense, as they bind only the requesting party and the Customs Service and are limited to the facts presented in the request, be it from an importer or a customs officer. Other types of rulings and agency pronouncements may be of broader applicability and carry more precedential weight. Tariff classification rulings are frequently revoked or modified, and therefore, at the time a ruling is issued Customs explicitly warns third parties not to rely upon them. Given the wide variety of agency interpretive statements (rulings and otherwise), granting *Chevron* deference to this category of rulings would create great uncertainty as to the level of deference due to Customs' numerous other kinds of pronouncements.

The commercial considerations weighing against the Government's position in this case also include the likely effect on the behavior of private parties. Granting *Chevron* deference to classification rulings would undermine the current legal framework that seeks to promote uniformity and predictability

in commercial transactions by encouraging importers to seek guidance from Customs. If courts were to give classification rulings *Chevron* deference, importers would be discouraged from seeking such advance guidance because of the risk of having to bear a higher burden in a subsequent judicial challenge. Importers would instead have the incentive to litigate classification disputes directly in court, without having obtained an advance ruling. Thus, it is highly likely that granting *Chevron* deference to such rulings would result in greater uncertainty and more litigation for the trade community.

ARGUMENT

I. The Applicable Judicial Precedent Rightly Distinguishes Regulations from Rulings.

The decision of the United States Court of Appeals for the Federal Circuit in this case correctly followed this Court's decision in *United States v. Haggar Apparel Co.*, 526 U.S. 380 (1999), in determining the type of agency action that warrants controlling-weight deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Federal Circuit concluded that *Chevron* deference should not be extended to ordinary classification rulings. *Mead Corp. v. United States*, 185 F.3d 1304, 1307 (Fed. Cir. 1999). This Court in *Christensen v. Harris County*, 120 S. Ct. 1655 (2000), reaffirmed this principle and clarified that *Chevron* deference is warranted only where agency action has the force of law, as when it promulgates regulations under the Administrative Procedure Act. Informal administrative ruling letters of the type at issue in this case do not have the force of law, and therefore are not entitled to *Chevron* deference. Such rulings have a limited purpose to provide only the importer who asked for the ruling with certainty as to the rate of duty on goods it

intends to import and to ensure that the same classification and rate of duty will be applied by customs officers "at the various ports of entry." 19 U.S.C. § 1502(a).

A. Rulings, Unlike Regulations, Do Not Have the Force of Law.

In the initial classification ruling in this case, Customs informed Mead that, for tariff classification purposes, its product is an "other (nonenumerated) article[ ] similar to registers, account books, notebooks, receipt books and diaries."[12] Customs subsequently reversed the initial ruling and classified the product as a bound diary.[13] This ruling did not contain general guidelines, and it was not subject to notice-and-comment or any other form of reasoned or deliberative rulemaking. In fact, the customs regulations caution importers about the limited application of such interpretive rulings, stating that "[n]o other person should rely on the ruling letter or assume that the principles of that ruling will be applied in connection with any transaction other than the one described in the letter." 19 C.F.R. § 177.9(c). Thus, the customs regulations provide that the classification ruling here can only be applied to Mead and cannot be relied upon by other parties.[14]

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12 N.Y. Ruling 864206 (June 19, 1991).

13 Headquarters Ruling 953126 (Jan. 11, 1993).

14 The government cites to the provision of the regulations that makes such rulings binding on all Customs officials (19 C.F.R. § 177.9(a)) to somehow suggest that the rulings have greater force. This argument is misplaced. The binding nature of such rulings is intended to promote the goal of uniformity among the ports. This is not the same, however, as adopting a rule of general applicability that has the force of law as to parties other than Customs and the applicant.

B. *Chevron* Deference is Warranted Only When Agencies Act Pursuant to a Congressional Delegation of Authority.

The object of deference to agency action under *Chevron* is to give effect to the intent of Congress where it has delegated its lawmaking authority. *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612 (1996). In this way, the courts do not usurp power granted to the executive branch. As this Court noted in *Chevron*, the courts should not engage in policy determinations that are vested in other branches. 467 U.S. at 866, citing *TVA v. Hill*, 437 U.S. 153, 195 (1978).

The decisions of this Court have established an effective and comprehensive framework for the courts to use in determining when to accord *Chevron*-style deference to a given agency action. This framework rests on the separation of powers and the very limited role of the judiciary. This Court has drawn a clear path for agencies and the courts: where deference is sought or to be given, the agency must be engaged in a deliberative process of lawmaking. If not, as here, the policy concerns raised by this Court in *Chevron* are absent and deference of that type is unwarranted.[15]

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15 As indicated in Respondent's Supplemental Brief, the government has failed to raise the question of whether a lesser deference standard is available; the consideration of such a standard has therefore been waived.

C. This Court in *Christensen* Recognized that Rulings of this Type are Not Entitled to *Chevron* Deference.

This Court properly accorded *Chevron* deference to duly promulgated regulations in *United States v. Haggar Apparel Co.* However, in *Haggar*, a primary consideration was that the agency engaged in notice and comment rulemaking in promulgating the regulation at issue. 526 U.S. at 390. To deny deference to an agency action of this nature "implies a significant departure from conventional contemporary administrative practice." *Id.* In *Christensen*, by contrast, this Court confronted "an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking." 120 S. Ct. at 1662. In holding that the opinion letter was not entitled to *Chevron* deference, the Court stated:

> Interpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference.

Id. Thus, the Court underscored the clear distinction between the promulgation of a regulation which is subject to a deliberative process, as was at issue in *Haggar*, and the issuance of an informal ruling letter which involves only a limited review.

II. The Government's Expansive Reading of 19 U.S.C. § 1502(a) Is Not Supported by a Plain Reading of the Statute or Its Legislative History.

The Government cites 19 U.S.C. § 1502 throughout its brief, but in disregard for how the Congress actually worded the statute. The Government states in its brief, beginning on page 5:

> That statute authorizes the Secretary of the Treasury to adopt "rules and regulations" providing for the issuance of such "binding rulings prior to the entry of the merchandise" as may "be necessary to secure a just, impartial, and uniform appraisement of imported merchandise and the classification and assessment of duties thereon * * * ."

The law itself, however, reads differently:

> **(a) Powers of Secretary of the Treasury**
>
> The Secretary of the Treasury shall establish and promulgate such rules and regulations not inconsistent with the law (*including regulations establishing procedures* for the issuance of binding rulings prior to the entry of the merchandise concerned), and may disseminate such information as may be necessary to secure a just, impartial, and uniform appraisement of imported merchandise and the classification and assessment of duties thereon at the various ports of entry.

19 U.S.C. § 1502 (emphasis added).

Congress authorized the Customs Service to "promulgate such rules and regulations" . . . "(including regulations establishing *procedures for the issuance* of binding rulings prior to the entry of merchandise.)" The parenthetical language in 19 U.S.C. § 1502(a) was added in 1993 by Section 640 of the North American Free Trade Agreement Implementation Act, Public Law 103-182 (1993). The House of Representatives Report explains that the amendments to 19 U.S.C. § 1502, among other things, "authorize the Secretary to prescribe regulations for the issuance of binding rulings prior to the entry of merchandise." H.R. Rep. No. 361, 103d Cong., 1st Sess. 138 (1993). This amendment simply ratified what the Secretary had been doing for decades – promulgating procedural regulations for the issuance of rulings and issuing rulings on not only classification and appraisement, but also on every other aspect of the law the Customs Service administers.

The legislative history establishes that the purpose for adding the parenthetical language was to provide importers with a procedure by which they could obtain guidance from the Customs Service *prior to entry* in exercising their new responsibilities to classify and appraise merchandise imposed by Section 637(a) of the North American Free Trade Agreement Implementation Act. Long before 1993, Congress had directed that the Secretary of the Treasury provide rules and regulations and disseminate classification and appraisement information. The statute was and still is directed to Customs officials themselves, not the public and not the courts, and was intended to ensure that Customs officials throughout the country classify and appraise merchandise fairly, impartially, and uniformly. The Government's expansive reading of 19 U.S.C. § 1502(a) is dictated by its need, after this Court's

decision in *Christensen*, to find a specific Congressional delegation to issue rulings. However, a plain reading of the statute and its legislative history establishes that Congress' intent was much more limited.

III. There are Practical, Commercial Reasons for Not Giving Deference to Customs Service Classification Rulings.

A. It is Difficult to Distinguish Between Different Types of Rulings.

The standard established by *Chevron* is clear that only interpretive regulations, which are promulgated through the formal notice and comment procedures, are entitled to judicial deference. Extending this deference to classification and appraisement rulings would require the courts to draw distinctions between various forms of such rulings, between classification and appraisement letter rulings and letter rulings on other laws administered by Customs, and between letter rulings and other types of Customs policy pronouncements. There is no simple way to distinguish, for purposes of determining the applicable level of deference, between tariff classification rulings and Customs' pronouncements of policy and interpretation in other contexts. Should the Court depart from its current "bright-line" position, it would create great uncertainty as to the deference to be accorded to these other agency statements.

1. Tariff classification rulings represent only one of the many ways Customs issues interpretive statements of agency position.

A review of the various forms of Customs' written pronouncements may demonstrate to the Court the inappropriateness of extending any form of deference to classification rulings. Such rulings may take the form of a brief letter describing the merchandise and providing a reference to the applicable tariff provisions, or they may contain a detailed description of the merchandise and a fuller analysis of the relevant tariff provisions, the history of those provisions, and pertinent court decisions. In addition to rulings, other forms of agency written decisions include: internal advice memoranda issued by Customs' headquarters in response to requests from officials at local ports of entry (issued after goods have entered the country);[16] protest review decisions, which are issued by headquarters in response to a request from an importer who seeks independent review of a port official's decision (issued after goods have entered the country);[17] Treasury Decisions, generally published in the Customs Bulletin and on occasion in the Federal Register, which are issued by headquarters to address particular policy issues, including its interpretation of tariff terms; General Notices, yet another form of policy statement issued by headquarters, generally published in the Federal Register; "Informed Compliance" publications on the classification of many products, which are made available to the public on Customs' website;[18] and Directives and other

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16 19 C.F.R. § 177.11.

17 19 C.F.R. § 174.23 *et seq.*

18 According to a statement contained at the beginning of every Informed Compliance publication, these publications reflect "the Customs Service's position on or interpretation of the applicable laws or

documents published on Customs' website and electronic bulletin board, which contain official statements of agency position.

2. Customs rulings are "binding" in only a limited sense.

As the Government asserts, the law authorizes Customs to promulgate "regulations establishing procedures for the issuance of binding rulings."[19] The term "binding rulings," though much relied upon by the Government, is not defined either in the statute or in Customs' regulations. While the regulations address the "binding" nature of ruling letters, they also indicate a distinction between "rulings" and "ruling letters." Customs defines the term "ruling" as "a written statement issued by the Headquarters Office or the appropriate office of Customs ... that interprets and applies the provisions of the Customs and related laws to a specific set of facts."[20] Rulings may be set forth in "ruling letters" issued in response to written requests,[21] or they may be "other rulings," which are "statements of the official position of the Customs Service which are likely to be of widespread interest and application" and "are published in the Customs Bulletin, as described in § 177.10."[22] Section 177.10, in turn, refers to the publication of

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regulations as of the date of publication." Informed Compliance publications are usually entitled, "What Every Member of the Trade Community Should Know About: [Issue or Commodity Name]." Customs has issued Informed Compliance publications addressing the classification of over thirty types of commodities, such as caviar, children's apparel, and festive articles.

19 19 U.S.C. § 1502(a).

20 19 C.F.R. § 177.1(d)(1).

21 *Id.*

22 19 C.F.R. § 177.8(b).

"any precedential decision," which term includes, for purposes of that paragraph, "any ruling letter, internal advice memorandum, or protest review decision."[23] However, whereas § 177.8(b) rulings are to be published in the Customs Bulletin, "precedential decisions" need not be as long as they are made available for public inspection.

While the regulations do not discuss binding rulings, Customs makes very clear in its regulations that a ruling letter (as opposed to a ruling) is "binding" only on the Customs Service and on the party who requested it,[24] and that other parties are not to rely on it:

> A ruling letter is subject to modification or revocation without notice to any person, except the person to whom the letter was addressed. Accordingly, no other person should rely on the ruling letter or assume that the principles of that ruling will be applied in connection with any transaction other than the one described in the letter.

19 C.F.R. § 177.9(c).

Thus, under its authority to promulgate regulations for the issuance of "binding rulings," Customs has created a confusing array of agency pronouncements. Ruling letters are

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23 19 C.F.R. § 177.10(a).

24 19 C.F.R. § 177.9(a). "A ruling letter issued by the Customs Service under the provisions of this part represents the official position of the Customs Service with respect to the particular transaction or issue described therein and is binding on all Customs Service personnel in accordance with the provisions of this section until modified or revoked."

binding only on the requesting party and on Customs; some ruling letters (as well as "other rulings") may be "precedential" and "of widespread interest and application" and are to be published in the Customs Bulletin or otherwise made available to the public; *but under no circumstances should third parties rely upon them or assume that the rulings' principles will be applied to any other transaction.* Nonetheless, the Government asks the Court in this context to extend *Chevron* deference to tariff classification rulings, when Customs will not permit any third party to rely on those rulings.

As acknowledged in *Chevron*, "[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Chevron*, 467 U.S. at 843. Where the Customs Service counsels in its regulations against relying on any ruling or the principles contained in those rulings, even in so-called "precedential decisions," it can not be said to be "making . . . rules to fill any gap left, implicitly or explicitly, by Congress."

3. The inconsistent and changeable nature of Customs rulings makes them an inappropriate subject for *Chevron* deference.

As noted above, customs rulings may be issued either by attorneys at Customs headquarters or by import specialists at individual ports of entry. As the Federal Circuit noted in *Mead*, these rulings are "an even less formalized body of interpretation than IRS revenue rulings." 185 F.3d at 1308. Unlike IRS revenue rulings, they do not issue from a single entity within the agency, and few of them are actually published. *See id.* Customs rulings suffer from a lack of

consistency in terms of both the nature and degree of legal analysis. For example, one importer may obtain a one-paragraph ruling from an import specialist stating how a particular product should be classified but giving no explanation for the conclusion, whereas another importer may obtain a lengthy, well-reasoned ruling from Customs headquarters which supports its conclusion with a clear exposition of the facts and controlling legal authority. A decision that all tariff classification rulings deserve deference would also encompass the former type.

Furthermore, Customs appears not even to have a full appreciation of rulings it has issued in the past. This results in, among other problems,[25] the issuance of rulings that reach different conclusions on the correct classification of what appear to be identical products.[26] Customs appears not always to research its own position on a particular product before issuing another ruling pertaining to that product. If deference is to be given to all classification rulings, courts will have difficulty reconciling such conflicting rulings. It is conceivable that a court could be asked to review a ruling -- and give

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25 Even where Customs revokes or modifies a ruling, it does not attempt to identify existing rulings which may be affected. Instead, it inserts the following standard language into all notices of revocation or modification: "This [revocation or modification] will cover any rulings on this issue which may exist but have not been specifically identified."

26 For example, in an August 4, 1999, "General Notice," the Customs Service admitted that it "has issued inconsistent rulings regarding chemical compounds imported in bulk . . ." and requested comments from the public as to how to reconcile these rulings. General Notice: Solicitation of Comments Regarding the Classification of Pharmaceutical Products Imported for Clinical Research, 33 CUST. BULL. & DEC. 31 at 14 (Aug. 4, 1999).

judicial deference to that ruling -- when another ruling exists in which the agency reached a contradictory conclusion.

This inconsistency is underscored by the frequency with which such rulings are modified or revoked. Since January 1994, there have been 459 rulings either modified or revoked by Customs, and of these, 135 were rulings prepared by attorneys in the Office of Regulations and Rulings in Customs' headquarters.[27] These numbers suggest the rather perfunctory process by which the rulings are often issued and the frequency with which the agency acknowledges that they are incorrect or inconsistent.

4. Granting *Chevron* deference to tariff classification rulings would create uncertainty as to the level of deference owed to other forms of agency statements.

Extending *Chevron* deference to classification rulings raises the question whether deference is due to the myriad other types of non-regulation agency actions.[28] Most of Customs' pronouncements are in the nature of general policy statements (as in the case of Treasury Decisions or "informed compliance" publications), even though they may be issued through formal notice-and-comment procedures (as in the case of some -- but not all -- "General Notices"). This Court in *Christensen* clearly stated that such interpretations "do not warrant

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27 This information was obtained through a query of Fuglei's "Customs Info" CD-ROM database, which is commercially available and widely used in the trade community. The query covered the period January 1, 1994, through May 19, 2000.

28 Many rulings are not issued under 19 U.S.C. § 1502, which only applies to classification and appraisement rulings.

Chevron-style deference." *Christensen*, 120 S. Ct. at 1662. The courts' current standard -- according deference only to interpretive regulations -- is clear and workable.

Granting judicial deference to Customs' pronouncements would also require courts to acquiesce in what may be improper assumptions of authority by the agency. For example, in a "final interpretation" published in the Federal Register regarding criteria to be used in determining country of origin marking, Customs announced that it was departing from judicial precedent on the issue because it believed that precedent was no longer valid. While the court had expressly indicated that a shift from a producers' good to a consumers' good is relevant in determining whether the good undergoes a substantial transformation for marking purposes (*Midwood Indus., Inc. v. United States*, 313 F. Supp. 951 (Cust. Ct. 1970), *appeal dismissed*, 57 C.C.P.A. 141 (1970)), Customs announced its decision not to follow this case. "It is Customs' opinion that based on subsequent court decisions applying substantial transformation analysis, *Midwood* would be decided differently today." *Application of Producers' Good Versus Consumers' Good Test in Determining Country of Origin Marking; Final Interpretation*, 65 Fed. Reg. 13,827 (2000). This statement of the agency's position was, like a customs regulation, promulgated through formal notice and comment procedures and intended to be a rule of general application. If deference were extended to customs rulings, which lack such procedural safeguards, then a court would also seem to be required to grant deference to agency pronouncements such as these, giving Customs almost unfettered discretion to contradict

otherwise valid case law in establishing agency policy.[29] There is no possible reason for requiring the courts to defer to Customs on the construction of a law when Customs feels free to disregard court decisions it finds unpersuasive.

B. Giving *Chevron* Deference to Rulings Would Discourage Commercial Parties from Seeking a Ruling from the Customs Service, and Would Result in Increased Litigation and Unpredictable Outcomes.

The Government argues that there is "substantial practical importance" attending the decision whether to defer to rulings issued by the Customs Service. Government's Brief at 37. According to the Government, the Customs Service "routinely employs" what it calls "binding rulings" to "address the proper application of the detailed customs provisions to the 'limitless factual variations' created by modern commerce." *Id.* at 37-38 (citation omitted). The Government concludes that without deference, both importers and the Customs Service would be left "without effective guidance for a wide range of transactions." *Id.* at 38.

The companies that make up this *amicus curiae* agree that there is a "substantial practical importance" to the issue before the Court today. If courts are required to give *Chevron* deference -- "controlling weight"-- to Customs Service rulings,

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[29] Since the publication of this notice, at least one judge of the Court of International Trade has indicated continuing approval of the *Midwood* rationale by citing case law that follows *Midwood*: "See, *e.g.*, *S.D.I. Technologies, Inc.* . . . (noting that a shift from producer goods to consumer goods may have some evidentiary value)." *Sassy, Inc. v. United States*, Slip Op. No. 00-93, at 9 (Ct. Int'l Trade August 2, 2000) (internal citation omitted).

the effect would be to discourage commercial parties from seeking a ruling in the first place. After all, if an importer receives a ruling from the Customs Service with which it is dissatisfied, that importer would be in the anomalous position of having a more difficult burden in court than an importer who did not receive a ruling from the Customs Service. That is, the importer would be required to show that the statute at issue is unambiguous, or if ambiguous, that Customs' interpretation is unreasonable.

Importers are not required to seek a ruling from the Customs Service. If an importer is not satisfied with the decision of the Customs Service reflected in the liquidation of an entry of merchandise, the importer must file an administrative protest contesting the decision as a prerequisite to obtaining judicial review of the matter. If the importer files a protest with the Customs Service, it will receive a decision on the protest simply allowing, denying, or allowing in part the protest. If, however, the importer also requests "further review" of the protest[30] and Customs determines that further review is warranted, then in addition to a decision on the protest, the importer will also receive a ruling in the form of a "protest review decision" from the Customs Service providing the reasons for the Customs Service's decision.

If the courts are required to give deference to Customs Service rulings, the effect would be to discourage importers from requesting a protest review decision. Importers who receive a simple decision on the protest without a ruling would then be able to challenge the decision in court without having the court give "controlling weight" to the position taken by the Customs Service.

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30 19 C.F.R. § 174.23.

Moreover, the Government has argued that the Federal Circuit's decision not to give deference to rulings will result in "expensive customs litigation and unpredictable outcomes." Government's Brief at 38. The member companies of this *amicus curiae* believe that the opposite is true.

As noted above, giving deference to rulings would discourage commercial parties from seeking rulings from the Customs Service. Importers would refrain from seeking rulings, and would use the protest procedures to obtain judicial review of any adverse ruling without having to overcome the high hurdle of proving its "unreasonableness." As is currently the practice, the courts would consider the validity of Customs' decisions based on the evidence presented at trial and the persuasiveness of the legal reasoning.

The Government has indicated that Customs' headquarters issues more than 1,000 "binding rulings" each year "involving tariff classification, customs valuation and country of origin determinations."[31] Government's Brief at 38, note 26. We acknowledge that, as Congress intended, these rulings are in many cases helpful and provide guidance to the importing community as to the Customs Service's current position on a given topic, and provide a measure of certainty to those engaged in importing. The ruling process was not, however, intended to give Customs unfettered power to limit the rights of importers and other parties to obtain effective judicial review. However, if importers are discouraged from requesting rulings because the courts must give *Chevron* deference to Customs' pronouncements, they will have lost the benefit of having this corpus of interpretation and guidance.

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31 The Government conveniently ignores the more than 10,000 ruling letters issued by other offices within Customs.

The result would be, using the Government's terms, "expensive litigation and unpredictable outcomes."

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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DATED: August 14, 2000

APPENDIX

APPENDIX

JOINT INDUSTRY GROUP

3M
Ablondi, Foster, Sobin & Davidow, p.c.
Adduci, Mastriani & Schaumberg, LLP
Air Courier Conference of America
Airfreight Warehouse Corporation
Akin, Gump, Strauss, Hauer & Feld, LLP
American Chemistry Council
American Electronics Association
American Institute for International Steel
American Iron and Steel Institute
Arent, Fox, Kintner, Plotkin & Kahn
Arter & Hadden
Arthur Andersen & Company
Arthur Andersen, LLP
Arthur Cherry Associates
Association of International Automobile Manufacturers
Baker & McKenzie
Barnes, Richardson & Colburn
Blasdel & Company
Border Trade Alliance
Broker Power, Inc.
C.H. Powell Company
Capstan Trade Systems
Case Corporation
Caterpillar Inc.
CNF Transportation
Compaq
Computer Sciences Corporation
Consolidated Freightways
Corning, Inc.
Deere & Company

*JOINT INDUSTRY GROUP, **continued***

Dorsey & Whitney
E.I. DuPont de Nemours & Co.
Elle International
Emery Customs Brokers
Expeditors International of Washington, Inc.
Federal Express
Ford Motor Company
General Electric
General Motors Corporation
Gibson, Dunn & Crutcher LLP
Global Customs Advisors
Gottlieb & Pearson
Hapag-Lloyd America Inc.
Hewlett-Packard
Hitachi America, Ltd.
Honeywell
Hoppel, Mayer & Coleman
Intel Corporation
International Business Machines
International Mass Retail Association
International Warehouse Logistics Association
Int'l Business-Government Counsellors
JBC International
Katten Muchin & Zavis
Ken Kumm
Kent & O'Connor
KPMG LLP
Law Offices of Stewart & Stewart
Levi Strauss & Co.
Lexmark International Inc.
Limited Distribution Services
Logicon/Northrup Grumman
Lucent Technologies, Inc.

*JOINT INDUSTRY GROUP, **continued***

MAERSK Sealand
Matsushita Electric Corporation
Mattel
Microsoft Corporation
Miller & Company P.C.
Motorola, Inc.
National Association of Foreign Trade Zones
National Association of Manufacturers
National Retail Federation
NCBFAA
Neville, Peterson & Williams
NextLinx Corporation
Northern Telecom
P&O Nedlloyd Limited
Pacific Merchant Shipping Association
Parker & Company
Parker & Company
Patton Boggs
Powell, Goldstein, Frazer & Murphy, LLP
PricewaterhouseCooopers LLP
Roadway Express, Inc.
Rockwell Collins, Inc.
Rode & Qualey
Ross & Hardies
Samuel Shapiro & Co., Inc.
Sandler, Travis & Rosenberg, P.A.
Sara Lee Knit Products
Sea-Land Service, Inc.
Serko & Simon
Shea & Gardner
Sonnenschein, Nath & Rosenthal
Sony Electronics Inc.
Stein, Shostak, Shostak, & O'Hara

*JOINT INDUSTRY GROUP, **continued***

Sun Microsystems, Inc.
Tech Data
Texas Instruments, Inc.
The Dow Chemical Company
The Procter & Gamble Distributing Co.
Tower Group International
Toyota Motor Sales, U.S.A., Inc.
Toyota Tsusho America, Inc.
Unz & Company
UPS Customhouse Brokerage
Vastera
Vorys, Sater, Seymour and Pease LLP
Wal-Mart Stores, Inc.
Warner-Lambert Company
Washington International Insurance Co.
West Gulf Maritime Association
Weyerhaeuser
Wilmer, Cutler & Pickering

ALLIANCE OF AUTOMOBILE MANUFACTURERS

BMW Group
Daimler Chrysler Corporation
Fiat Auto S.p.A.
Ford Motor Company
General Motors Corporation
Isuzu Motors America, Inc.
Mazda North American Operations
Mitsubishi Motor Sales of America, Inc.
Nissan North America, Inc.
Porsche Cars North America, Inc.
Toyota Motor North America, Inc.

Volkswagen of America, Inc.
Volvo Cars of North America, Inc.

INTERNATIONAL MASS RETAIL ASSOCIATION

Retail Member Companies
The 1/2 Off Card Shop/Card and Party Giant
A.J. Wright
AAA National Headquarters
Academy Corp.
Ace Hardware
Active International
Advance Auto Parts, Inc.
Aerial Company, Inc.
Almacenes Exito S.A.
Ames Department Stores, Inc.
Ammar's, Inc.
Armature Inc.
Army & Air Force Exchange Service, HQ
AutoZone
B.J.'s Wholesale Club Inc.
Babbage's Etc.
The Bargain! Shop Holdings, Inc.
Bass Pro Shops
Bath & Body Works
The Behnke Nurseries Co.
Benny's Inc.
Best Buy Company, Inc.
BestBuy.Com
Bi-Way Stores Limited
Big W Limited
Bill's Dollar Stores Inc.
Blain Supply, Inc.
BOAT/U.S. (Boat America Corporation)

INTERNATIONAL MASS RETAIL ASSOCIATION, continued
Retail Member Companies

Bradlees, Inc.
Brand Names Sale
BrandsMart U.S.A.
Burlington Coat Factory
Canadian Tire Corporation Limited
CANEX
CarMax
Casa Video
Chase-Pitkin Home & Garden
Circuit City Stores, Inc.
Claire's Stores, Inc.
The Clicks Organisation (PTY) Ltd
COMPRAS COMODAS
Consolidated Stores Corporation
Copeland's Sports
CSK Auto, Inc.
Denning House - A Buck Or Two
DFS Group Ltd.
Dickies Outlet Stores
The Disney Store, Inc.
Dollar General Corporation
Dollar Tree Stores, Inc.
Drogueria Y Farmacia El Fenix, S.A. de C.V.
Drug Emporium
DSW Shoe Warehouse
Duckwall-Alco Stores, Inc.
Eastern Mountain Sports, Inc.
Exodus Genesis
Express
Factory 2-U Stores, Inc.
Family Dollar Stores, Inc.
Farm & Fleet of Dodgeville, Inc.

INTERNATIONAL MASS RETAIL ASSOCIATION, continued
Retail Member Companies

Farmacias Arrocha
Fleetwood Retail Corp.
Food Lion, Inc.
Frank's Nursery & Crafts, Inc.
Fred's, Inc.
G.I. Joe's Inc.
Garden Ridge Corporation
Giant Eagle, Inc.
Giant Tiger Stores Ltd.
Gibson's
The Glidden Company
Goodwill Industries International, Inc.
Goody's Family Clothing, Inc.
Gordman's, Inc.
Gordon Brothers Group, LLC
Grainger Industrial Supply
Great American Group
Gregg Appliances, Inc.
Grupo Triangulo
Healthy Fundraising, Inc.
Heilig-Meyers Co.
Hilco Trading Company, Inc.
The Home Depot, Canada
The Home Depot, U.S.A., Inc.
Home Hardware Stores Limited
Home Shopping Network
HomePlace of America, Inc.
Hub Distributing, Inc.
Hudson's Bay Company
IKEA U.S., Inc.
J. Baker, Inc.
Jerry's Home Improvement Center

INTERNATIONAL MASS RETAIL ASSOCIATION, continued
Retail Member Companies

Jo-Ann Stores, Inc.
Kay International
Kay-Bee Toy Stores, Inc.
Kinko's, Inc. World Headquarters
Kitchin's Stores
Kmart Canada Ltd.
Kmart Corporation
La Fragua S.A., C/o CARBEN, Inc.
Lari Group Co., Inc.
Lechters, Inc.
Levitz Furniture Corporation
Lian Hua Supermarket Co., Ltd. (Lian Mao Corp.)
Lima Bargain Center
The Limited, Inc.
Lowe's Companies, Inc.
Marburn Stores, Inc.
Marina Export, Inc. (Almacenes Vivero S.A.)
Marks & Spencer, PLC
Maurices Incorporated
McDonald's Corporation
Meijer, Inc.
Mervyn's California
Michaels Stores, Inc.
Midas International Corporation
Mills Supply, Inc.
Modell's Sporting Goods
Modern Woman
Navy Exchange Service Command
Northern Tool & Equipment Co.
Ocean State Jobbers, Inc.
Office Depot, Inc.
Ollie's Bargain Outlets, Inc.

INTERNATIONAL MASS RETAIL ASSOCIATION, continued
Retail Member Companies

One Price Clothing Stores, Inc.
Orscheln Farm and Home L.L.C.
Pamida, Inc.
Party City Corporation
Payless Cashways, Inc.
Payless ShoeSource, Inc.
Penske Auto Centers
PEP BOYS
Petco Animal Supplies, Inc.
PETsMART, Inc.
Price-Less Drug Stores, Inc.
Pricebusters Co., Ltd.
Purina Mills America's Country Store
Quality Stores, Inc.
Regis Corporation
Rooms To Go, Inc.
Royal Duty-Free Shops, Inc.
ru4.com
SAAN Stores Ltd.
SAM'S Club
Schottenstein Stores Corporation
Scotty's
Shaw's Supermarkets
Shonac Corporation
ShopKo Stores, Inc.
Shorr Electronic's Inc.
The Shui Hing Company, Ltd.
Simply Fashion Stores, Ltd
The Sports Authority, Inc.
Starbucks Coffee Co.
Strauss Discount Auto
Sunglass Hut International

Syms Corporation
Target Corporation
Target Stores, Inc.
Toy Biz, Inc.
Tractor Supply Company
Trend-Lines, Inc.
Truck Pro
TruServ Corporation
Urban Outfitters
Value City Department Stores, Inc.
Variety Wholesalers, Inc.
Wal-Mart Canada, Inc.
Wal-Mart Stores, Inc.
wal-mart.com
Warner Brothers Studio Stores
West Marine
WhatsHotNow.Com
Wilkinson Hardware Stores Ltd.
Woolworths Limited
Zale Corporation
Zellers Inc.

Supplier Member Companies

'K' Line America, Inc.
3M Company
A & W Products Co., Inc.
A. T. Cross Company
A.J. Siris Products Corporation
AAi.Foster Grant, Inc.
Accessory Network
Acclaim Entertainment
Accu Chek, Inc.

Aero Plastics, Inc.
Air Plus Limited
Aladdin Industries, Inc.
Alliance Logistics Consulting Group, Inc.
Almar Sales Co.
Alpha Security Products
American Coin Merchandising
American Color Graphics
American Dream Team Network
American Express Company
American Greetings Corporation
Amerock Cabinet Hardware
Ames True Temper
Ampad
Anchor Hocking Glass Company
Anderson Merchandisers, Inc.
Andis Company
Anheuser-Busch Companies
Ann's House of Nuts, Inc.
Appliance Co. of America LLC
Applied Communications, Inc.
Applied Graphics Technologies
Applied Science Fiction
ARC International
Arch Chemicals, Inc.
Arthur Andersen LLP
Atlantic, Inc.
Auburn Hosiery Mills, Inc.
Aurora Foods, Inc.
Avista Advantage
B & G Foods, Inc.
Baptista's Bakery

INTERNATIONAL MASS RETAIL ASSOCIATION, continued
Supplier Member Companies

Barth & Dreyfuss of California
Bax Global
Bayer Corporation, Consumer Care Division
Bemis Manufacturing Company
Benckiser Consumer Products
Benetton Sportsystem
Bestfoods
Bestform, Inc.
The Betesh Group
BIC Corporation
Biederlack of America
Binney & Smith Inc.
Bissell, Inc.
Black & Decker (U.S.), Inc.
Braun Inc.
Braun National Retail Services
Bretlin Inc.
Brian P. Hakan & Associates, Inc.
Briggs & Stratton Corporation
The Brinkmann Corporation
Buena Vista Home Entertainment
Bulldog Hardware
Burian & Assoc., Inc.
Burlington Industries
The Burlington Northern and Santa Fe Railway Company
The Buschman Company
Butler Home Products
C&S Products Co., Inc.
California Cartage Company, Inc.
The Campbell Group
Campbell Soup Company
CANDLE-LITE

INTERNATIONAL MASS RETAIL ASSOCIATION, continued
Supplier Member Companies

Cardinal Logistics Management
Case Logic, Inc.
Checkagain
Checkered Flag Sports
Checkpoint Systems, Inc.
Chemence, Inc.
Chep USA
Cheyenne Industries
Child's Play
Chipman-Union, Inc.
Cleaning Solutions Group
Clear-Vu Products
The Clorox Company
Coats & Clark
The Coca-Cola Company - Licensing Division
Coca-Cola USA
COELIMA USA, Inc.
The Coleman Co., Inc.
Coleman Consulting Group, Inc.
Colgate-Palmolive Co.
Command Security Corporation
Con-Tact Brand/Decora, Inc.
Conair Corporation
Conimar Corporation
Conros Corporation
Consolidated Freightways Corp.
Cooper Lighting/Regent Lighting
Copco
Corporate Security Management, Inc.
Cox Target Media
CPM Worldwide, LLC
Cranston Print Works, Co.

INTERNATIONAL MASS RETAIL ASSOCIATION, continued
Supplier Member Companies

Creative Solutions Group
Crimebite, LTD
Crisplant Inc.
Crown Equipment Corporation
Crystal Art Gallery
CSS Industries, Inc.
Dale Tiffany, Inc.
Decision Point Systems
Del Laboratories, Inc.
Del Monte Foods
Del Pharmaceuticals, Inc.
Deloitte & Touche LLP
Deluxe Payment Protection Systems, Inc.
Demand Management Inc.
Deni/Keystone Manufacturing Co., Inc.
Design Forum
Did You Sports
Discount Store News
Discover Business Services
Disney Consumer Products
Dr Pepper / Seven Up, Inc.
Dremel
Drypers Corporation
DSL Integrated Logistics, Inc.
Dugan Valva Contess
Dunbar Armored
Duracell North Atlantic Group
Dynamic Express, Inc.
Dyno Merchandise
E&J Gallo Winery
E3 Corporation
Eastern America Transport & Warehousing, Inc.

INTERNATIONAL MASS RETAIL ASSOCIATION, continued
Supplier Member Companies

Eastman Kodak Company
Econoco Corporation
Efficient Consumer Response Management
Energizer
Entergy Services, Inc.
ERO Industries, Inc.
ERS International, Inc.
Esselte Corporation
ETA Transportation, Inc.
The Eureka Company
Ex-Cell Home Fashions
Exel Logistics Americas
EZ Paintr
Fairchild Publications
Fantasia Accessories, Ltd.
Fasteners For Retail
Fedders North America
The Federal Wholesale Group
FedEx Services
Feldstein & Associates, Inc.
Fiesta Gas Grills, LLC
Fifth Avenue Channel Retail
First Act Inc. Entertainment & Publishing
First Alert
The First Years
Fiskars Consumer Products, Inc.
Flents Products Company, Inc.
Floor Graphics
Floor Ready Retail Processing
Florida Power & Light Co.
Forrester & Vos Co.
Fort James Corporation

INTERNATIONAL MASS RETAIL ASSOCIATION, continued
Supplier Member Companies

Fox Consumer Products
Fragrance Solutions
Franco Manufacturing Co., Inc.
Franklin Sports, Inc.
Freeride.Com, LLC
French Toast
Frito-Lay, Inc.
Fruit of the Loom
Fuji Photo Film USA, Inc.
Garrity Industries
GE Home Electric Products, Inc.
GEA Management & Consulting
Gemini Industries, Inc.
GENCO Distribution System
General Mills, Inc.
Georgia-Pacific Corporation
Gerber Childrenswear, Inc.
The Gillette Company
Ginsey Industries
Glenoit Corporation
Goody Products
Goya Foods, Inc.
Grosfillex
H. J. Heinz Co.
The Haddad Apparel Group, Ltd.
Hallmark Cards, Inc.
Hallmark Jewelry
Hamilton Beach/Proctor-Silex, Inc.
Hanover Accessories
Happy Kids
Harbortown Industries, Inc.
Harper Leather Goods

INTERNATIONAL MASS RETAIL ASSOCIATION, continued
Supplier Member Companies

Harte - Hanks Direct Marketing
The Hartz Group
Hasbro, Inc.
Haywin Textile Products, Inc.
Hedstrom Corporation
Heinz Pet Products
Helen of Troy, L.P.
Helmac Products Corp.
Henry Doneger Associates, Inc.
HMG Worldwide
Holiday Housewares, Inc.
The Holmes Group
Home Products International
Honeywell Consumer Products
The Hoover Company
Hormel Foods Corporation
HotOffTheWire.Com
Howard Schultz & Associates International
Hub Group, Inc.
Hudd Distribution Services, Inc.
Huffy Corporation
Hypnotic Hats, Ltd.
IBM Corporation
ideavillage.com
Imperial Home Decor Group
Information Resources, Inc.
Innovative Global Consulting, Inc.
Integrated Business Consultancy
Intercraft/Holson Burnes
Interlake Material Handling, Inc.
Intermatic, Inc.
International Silver/Farberware Home Products

INTERNATIONAL MASS RETAIL ASSOCIATION, continued
Supplier Member Companies

Internet Cash.Com
Intertek Testing Services
Invacare Corporation
IRIS USA, Inc.
iSolve.com
J & H Marsh McLennan
J & M, Inc. - The Tattoo Source
J.E. Morgan Knitting Mills
Jack Link's Beef Jerky
Jelmar
Jerzees
Jevic Transportation Inc.
Jockey International, Inc.
Johnson & Johnson
Joseph Pedott Advertising/Joseph Enterprises Inc.
Just My Size Clothing Company
K & M Associates, L.P.
K' nex Industries
Kayser-Roth Corporation
Keebler Company
Kellwood Company
Kenzer Corporation
Keter North America
Kids International Corporation
Kikomo, Ltd.
KitchenAid
Konica Photo Imaging
KPMG
Kraco Enterprises, Inc.
Kurt Salmon Associates
L&N Sales and Marketing, Inc.
L'eggs Products

INTERNATIONAL MASS RETAIL ASSOCIATION, continued
Supplier Member Companies

L.A. Darling Company
L.R. Nelson Corporation
Lamour Hosiery USA
Lancaster Colony Corporation
Lander Co., Inc.
Lasko Metal Products, Inc.
Learning Horizons
LeeRowan
Leggett & Platt
Levolor Home Fashions
Libbey Inc.
LifeScan, Inc.
Lifetime Hoan Corporation
Lion Brand Yarn Company
Lipton
The Little Tikes Company
Lochridge & Company
Logistics Information Systems, Inc.
Loss Prevention Products, Inc.
Loss Prevention Systems
Lozier
Lumilite Products Co.
M&M / Mars
M-D Building Products, Inc.
M.R.S. Companies
M.S. Carriers
Madix Store Fixtures
Maersk Logistics
Magic Sliders L.P.
Magla Products
Magnivision
Main Street Products, LLC

INTERNATIONAL MASS RETAIL ASSOCIATION, continued
Supplier Member Companies

Major League Baseball Properties
Malt-O-Meal Company
Mancini Safe Company
MANCO, Inc. - A Henkel Group Company
MarketMAX, Inc.
MarketSource Corporation
Masonways Indestructible Plastics
Master Lock Company
Mattel, Inc.
Maurice Sporting Goods, Inc.
Maxell Corporation of America
MBR Industries
McCormick & Company, Inc.
Mead Consumer & Office Products
MEAG Power
The Media Group, Inc.
Media News Group
MEG
Meguiar's, Inc.
MELITTA USA, INC.
Meridian Advertising
The Metal Ware Corporation
METO USA
Meyer Corp.
Micro Software Services, Inc.
Milliken Rugs
Milnot/Beech-Nut Company
MinderSoft, Inc.
Mirro/WEAREVER
Mohawk Rug & Textiles
Motion Systems
Motorola

INTERNATIONAL MASS RETAIL ASSOCIATION, continued
Supplier Member Companies

Motorola TalkAbout
MTD Products, Inc.
Nabisco Food Company
National Manufacturing Company
National Picture & Frame Company
National Retail Systems
NationaLease
Native Tan
NCR Corporation
Nestle U.S.A.
The Network, Inc.
Neuville Industries, Inc.
New Creative Enterprises, Inc.
New Energy Ventures
New West Energy
Newell Industries Canada, Inc.
Newell Office Products
Newell Rubbermaid Inc.
Newell Window Furnishings Company
NFL Properties
Nickelodeon Consumer Products
Nomus Interiors, Inc.
Norelco Consumer Products Company
North American Plastics Corporation
Northland Cranberries, Inc.
NorthSound Music Group, Inc.
Nourison Rug Corp.
NOVA Home Appliances Mfg. Company, LLC
Novartis Consumer Health
Novus Services, Inc.
O'Sullivan Industries, Inc.
The Ocean Group

INTERNATIONAL MASS RETAIL ASSOCIATION, continued
Supplier Member Companies

OG&E Electric Services
Old Dominion Freight Line, Inc.
Old Williamsburgh Candle Corporation
Omega Paw, Inc.
Opus Inc.
Orient Consolidation Services
Orion Systems
Osram Sylvania Products Inc.
OurPet's
Over and Back, Inc.
Pacer International
Pacific Alliance/Regatta
Packaging Concepts Ltd.
Pan-Oston Company
Panasonic Battery Sales Group
Paragon Trade Brands
Parker Metal Corporation
The Paul Schultz Companies
Pen-Tab Industries, Inc.
Pentech International
Pentel of America, Ltd.
Pepsi-Cola Company
The Perrier Group of America
Personal Optics
Pet Friendly, Inc.
The Pfaltzgraff Company
Philips Lighting Company
PICS Retail Networks
Pilot Pen Corporation of America
Pinkerton Services Group
Pinnacle Art & Frame
Pioneer Photo Albums, Inc.

INTERNATIONAL MASS RETAIL ASSOCIATION, continued
Supplier Member Companies

Plainwell Tissue, Inc.
Plano Molding Company
Plochman, Inc.
Plus Mark, Inc.
Polaroid Corporation
Premier Candle Corp.
Presto Products Company
Price Waterhouse Coopers
PriceWaterhouse Coopers
Procter & Gamble Company
Procter & Gamble Company
Professional Logistics Management Co.
The Profit Recovery Group International, Inc.
ProFoot Products
Progressive International Corp.
Projexx, LLC
Protex International Corporation
Pyramid Accessories, Inc.
The Quaker Oats Company
Quebecor World
R Brands
R. M. Palmer Company
R.R. Donnelley & Sons Company
Radio Systems
Ralston Purina Company
Rapistan Systems
The Raymond Corporation
Rayovac Corporation
Real Time Solutions
Rebound
Red Devil, Inc.
Red Oak Farms, Inc.

INTERNATIONAL MASS RETAIL ASSOCIATION, continued
Supplier Member Companies

Rehrig International, Inc.
Reid Psychological Systems
Reliant Energy
Rembrandt Corporation
Remington Products Company, L.L.C.
Renfro Corporation
Retail Distributors, Inc.
Retail Merchandiser
RetailExchange.Com
Revlon Beauty Care Division
Revlon Classic Cosmetics & Fragrance
Revlon Inc.
Revlon Professional Products Group
REW Marketing, Inc.
Reynolds Metals Company
RGIS Inventory Specialists
Roadway Express, Inc.
Robinson Knife Company
Rollins Leasing Corp.
Romar
Ross Products Division
Royal Appliance Manufacturing Co.
Royal Floor Mats
Royal Lace/Royal Brites
Rubbermaid Home Products
S-B Power Tool Company
SacSaver, Inc.
Safe Science
Safe-Strap Company, Inc.
Safety 1st Canada, Inc.
Safety 1st, Inc. USA
Saft America Inc., Licensee of the Polaroid Corp. for C

INTERNATIONAL MASS RETAIL ASSOCIATION, continued
Supplier Member Companies

Salson Logistics Inc.
Salton/Toastmaster/Farberware
Sanford
SAP American
Sara Lee Branded Apparel
Sara Lee Sock Company
SaraMax Apparel Group, Inc.
Sarne' Corporation
SAS Group, Inc.
SC Direct, Inc.
SC Johnson Wax
Schreiber Foods, Inc.
SDI Industries, Inc.
SDI Technologies, Inc.
Se-Kure Controls, Inc.
Securitech Group, Inc.
Security Source, Inc.
Sedgwick Risk Management
Sedlak Management Consultants, Inc.
Select-A-Vision
Sensormatic Electronics Corporation
Sentry Group
Sentry Technology Corporation
Serengeti Eyewear, Inc.
Sergeant's Pet Products
Shalom International Corp.
ShopperTrak (A Division of Quadrix Corp.)
ShopVac Corporation
Shortage Control, Inc.
Signature Apparel
SII Marketing International, Inc.
Silicon Energy

INTERNATIONAL MASS RETAIL ASSOCIATION, continued
Supplier Member Companies

Simple Green
Sisco, Inc.
Smith Corona Corporation
South Carolina Electric & Gas Company
Southern California Edison
Southern Company
Spontex, Inc.
Springs Industries
Springs Window Fashions
St. George Crystal Ltd.
The Stanley Works
The Staubach Company
Sterilite Corporation
Store Opening Solutions
Strategic MindShare Consulting
Stylette
SubmitOrder.Com
Sunbeam Health & Safety Company
Sunlite Casual Furniture
Super Glue Corporation
Symbol Technologies, Inc.
Syratech Corporation
Syroco, Inc.
Tahiti Apparel/Signal Apparel
Tamor Corporation
Tasco Worldwide, Inc.
TC Advertising
TDK Electronics Corporation
TeleBrands Corporation
Telxon Corporation
Temerlin McClain
Teters Floral Products, Inc.

INTERNATIONAL MASS RETAIL ASSOCIATION, continued
Supplier Member Companies

Tetley U.S.A., Inc.
The Thermos Company
Thermwell Products Co., Inc.
Thomas Nelson Publishers, Inc.
Thorco Industries, Inc.
Tibbett & Britten Group
Tilia, Inc.
TimeCorp, A Division of Hewlett-Packard
Timex Corporation
Toastmaster, Inc.
Totes - Isotoner Corp.
Town & Country Linen Corp.
TradeOut.Com
Trans-Pacific Lines, Ltd.
Travel Smart by Franzus
TRISTAR Products, Inc.
Tropical Sportswear Int'l
Tropicana Products, Inc.
TTX Company
Tultex Corporation
Turn Up the Music, Inc.
Turtle Wax, Inc.
TXU Electric & Gas
U.S. Jesco International Ltd., Inc.
U.S. Mint
Unarco Material Handling, Inc.
Unilever Home & Personal Care USA
UnionTools, Inc.
United States Mutual Association (USMA)
United Steel & Wire Company
USA Detergents, Inc.
USF Distribution

INTERNATIONAL MASS RETAIL ASSOCIATION, continued
Supplier Member Companies

USF Processors
Vandale Industries
Vantage Industries
Vassarette
Vermont American Tool Company
VF Corporation
VF Jeanswear
Vitran Logistics
VLINX, Inc.
Voguestrap
W & H Systems, Inc.
Wahl Clipper Corporation
Walls Industries, Inc.
Warner Bros. Consumer Products
Washington Inventory Service
WaterPik, Inc.
Waxman Consumer Products Group, Inc.
WD-40 Company
Weaver Popcorn Company Inc.
Webster Industries
Weitech, Inc.
Wellington Leisure Products, Inc.
Wells Lamont Corporation
Werner Enterprises
Western Inventory Service Ltd.
WestPoint Stevens
Whitmor
Whitney Design, Inc.
Wilhold
Williams Foods Inc.
Williamson-Dickie Manufacturing Co.
Wilson Sporting Goods Company

INTERNATIONAL MASS RETAIL ASSOCIATION, continued
Supplier Member Companies

Wilton Industries
World Kitchen, Inc.
Worldwide Dreams LLC
Wundies Enterprises, Inc.
Yuppie Puppy Pet Care, Inc.
ZELCO Industries, Inc.
Zeta Consumer Products Corporation
Zodiac

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BRIEF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37.3(a), upon written consent of all parties, Cargill, Incorporated, The Pillsbury Company, Uniden Financial, Inc. and Xerox Corporation respectfully submit this brief *amicus curiae* in support of respondent The Mead Corporation's ("Mead") brief.

INTERESTS OF *AMICUS CURIAE**

Xerox Corporation is a publicly traded corporation with its shares listed on the New York Stock Exchange. The Pillsbury Company is owned by General Mills, Inc., a publicly traded corporation with its shares listed on the New York Stock Exchange. Cargill, Incorporated and Uniden Financial, Inc. are privately held corporations. Each of these *amici* has, in the past, received rulings from the United States Customs Service ("Customs"). In addition, each has filed civil actions in the United States Court of International Trade to challenge Customs decisions. The decision of this Court in this appeal will directly affect *amici's* decisions on whether to seek rulings from Customs concerning the classification of their merchandise.

STATEMENT

This case presents the issue of whether Customs

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* Counsel for the parties have consented to the filing of this amicus brief, and the letters of consent are being filed with this Court. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part. Further, no person or entity other than the listed *amici* made a monetary contribution to the preparation or submission of this brief.

classification rulings that are issued without public notice and comment are entitled to deference, under *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), by courts that consider challenges to such rulings under a *de novo* scope of review.

SUMMARY OF ARGUMENT

The Administrative Procedure Act distinguishes "legislative" regulations, that result from notice and comment rulemaking, from other forms of agency action. This Court has provided a high degree of judicial deference to validly adopted legislative regulations and agency interpretations of them. On the other hand, agency pronouncements, such as interpretive rulings, that are not the result of notice and comment rulemaking have not been given deference pursuant to *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), and subsequent cases.

Judicial challenges to Customs classification decisions, including decisions concerning import transactions where a ruling was previously issued, are subject to review *de novo* by the Court of International Trade. That Court's predecessor's longstanding interpretation of its *de novo* authority to preclude deference to underlying administrative decisions challenged under "protest" jurisdiction was known to Congress at the time the Customs Courts Act of 1980 was under legislative consideration. The legislative history of that Act explicitly states that it "restates existing law," indicating Congressional approbation of the lower court's application of its *de novo* authority. Moreover, the lower court's interpretation comports with this Court's directives concerning the scope of *de novo* review.

Tariff classification questions generally involve determination of the common and/or commercial meaning of

words in the tariff. Customs has no special expertise in making such determinations, and, to the contrary, this Court has stated that the interpretation of words in the tariff involves judicial knowledge. In these circumstances, deference to the agency's interpretation is unwarranted.

Customs rulings are nothing more than statements of agency enforcement intent, and have not undergone the rigors of public notice and comment. Their quality is inconsistent at best, perhaps because of the huge number of rulings issued annually by Customs and the absence of a mechanism for central review of them. Moreover, there is no official publication in which all Customs rulings are published, Customs has failed to revoke numerous rulings despite judicial decisions to the contrary, and the effect of rulings is limited to the specific requesting importer and the specific transaction described in the request. In these circumstances, *Chevron*-style deference to Customs rulings is inappropriate.

ARGUMENT

I. Informal Agency Interpretations, Such As Customs Rulings, Are Not Entitled to *Chevron* Deference

Because Customs rulings are not the product of "notice and comment" rulemaking, they do not constitute an exercise of delegated legislative authority, and are not owed judicial deference. The Administrative Procedure Act ("APA"), 5 U.S.C. § 553(b), distinguishes between "legislative" regulations which must be promulgated following published notice and opportunity for comment, and "interpretative rules, general statements of policy or rules of agency organization, procedure and practice", which do not require formal rulemaking under the APA.

This Court has required greater judicial deference to legislative regulations than to other forms of agency action,

acknowledging the more stringent and formalized process which Congress has prescribed for the adoption of legislative rules. In *Chrysler Corp. v. Brown*, 441 U.S. 281, 300 (1979)("*Chrysler*"), the Court wrote that:

> The central distinction among agency regulations found in the APA is that between "substantive rules" on the one hand and "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice on the other". . . . in *Morton v. Ruiz*, 415 U.S. 199 (1974), we noted a characteristic inherent in the concept of a "substantive rule." We described a substantive rule - or a "legislative -type rule", *Id.*, at 236 - as one "affecting individual rights and obligations." *Id.*, at 232. This characteristic is an important touchstone for distinguishing those rules that may be "binding" or have the "force of law." *Id.* at 235, 236.

Footnote omitted. The Court in *Chrysler* spelled out the consequences of this distinction:

> As we observed in *Batterton v. Francis*, 432 U.S., at 425 n.9: "[A] court is not required to give effect to an interpretative regulation. Varying degrees of deference are accorded to administrative interpretations, based on such factors as the timing and consistency of the agency's position, and the nature of its expertise." . . . "It is enough that such regulations are not properly promulgated as substantive rules, and therefore not the product of procedures which Congress prescribed as giving a regulation the binding

> effect of law."

Chrysler Corp., 441 U.S. at 315 (footnotes omitted).

More recent cases have affirmed *Chrysler's* distinction between legislative regulations and other forms of agency interpretation. *Christensen v. Harris County*, 120 S.Ct. 1655, 1662 (2000)("*Christensen*") explicitly distinguished administrative interpretations "arrived at, for example, after a formal adjudication or notice-and-comment rulemaking" from "[i]nterpretations such as those in opinion letters--like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law" and therefore "do not warrant *Chevron*-style deference." *Christensen*, relied on similar conclusions in recent cases:

> *See, e.g., Reno v. Koray*, 515 U.S. 50, 61 (1995) (internal agency guideline, which is not "subject to the rigors of the Administrative Procedur[e] Act, including public notice and comment," entitled only to "some deference" (internal quotation marks omitted)); *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 256-258 (1991) (interpretative guidelines do not receive *Chevron* deference); *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 157 (1991) (interpretative rules and enforcement guidelines are "not entitled to the same deference as norms that derive from the exercise of the Secretary's delegated lawmaking powers").

Id. at 1663. This most recent iteration of the legislative regulation-interpretive rule distinction reflects the Court's longstanding jurisprudence. *See also, United States v.*

Haggar Apparel Company, 526 U.S. 380, 386 (1999)(noting adoption of regulation following notice and comment rulemaking); *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99 (1995) (relying on *Chrysler* to distinguish interpretive rules, which "do not have the force and effect of law," from notice and comment rulemaking).

Petitioner asserts that "interpretive" Customs rulings are entitled to *Chevron*-type deference. (Pet'r Br. at 20, 21, 23). This argument is premised solely on a claim that Customs' ruling program is statutorily authorized, under 19 U.S.C. § 1502(a), and, therefore, any interpretive ruling issued under such a scheme deserves the same judicial deference as an agency regulation, even though such rulings are not issued pursuant to notice and comment rulemaking procedures. However, the government's argument misinterprets precedent, and draws a distinction that neither appears in this Court's decisions nor makes sense in light of the deficiencies in Customs' classification ruling program. Furthermore, the government incorrectly interprets 19 U.S.C. § 1502(c), which merely authorizes a regulatory rulemaking program, as conferring Congressional approval on the contents of the rulings themselves.

The government seizes on *Christensen's* general reference to K. Davis and R. Pierce, *Administrative Law Treatise*, 120 S.Ct. at 1663, as its sole authority for the notion that this Court has required *Chevron*-style deference for agency rulings issued under a grant of statutory authority. As even the government recognizes (Pet'r Br. at 28 n.1), the Court did not use the Treatise's language in its opinion. Nor is there any implication in *Christensen* that its "see generally" reference to the Treatise implied the otherwise unheralded adoption of a novel theory that accords interpretive rulings the same deference as legislative regulations.

In fact, the Treatise *rejects the very proposition that the government asserts.* The authors state that *Chevron* "should not be held to apply to agency pronouncements in

less formal formats [than legislative regulations], e.g., manuals, letters, guidelines, interpretative rules, or litigating positions." *Administrative Law Treatise* 3d ed. 1994 at 119. Further, the Treatise recognizes that the "format" established by Congress to warrant deference is the legislative regulation adoption process of the APA. Contrary to the government's assertion, the Treatise categorically rejects the notion that administrative action that falls short of formal legislative-type rulemaking should receive *Chevron* deference.

The government's mischaracterization simply ignores the distinction actually drawn in *Christensen*, and the cases cited therein, between notice-and-comment rulemaking and other, less rigorous formats for agency interpretations. Although Customs classification rulings are issued under a statutorily-authorized program, Congress has provided no standards for the issuances of rulings; Customs rulings are not the product of notice or comment, nor are they published in the *Federal Register* or any other official document. This distinguishes them from legislative-type regulations. The Court has recognized that it is the APA's stringent process for legislative-type rulemaking that warrants judicial deference to regulations. Customs rulings, however, are nothing more than interpretative rules, opinion letters, and other interpretations that are not "'subject to the rigors of the Administrative Procedur[e] Act, including public notice and comment'" and hence do not merit *Chevron* deference. *Christensen*, 120 S.Ct. at 1663, quoting *Reno v. Koray*, 515 U.S. at 61. Likewise, the government's "formal/informal" ruling distinction is entirely its own creation. The only formal proceedings referenced in *Christensen* were those involved in "formal adjudication or notice-and-comment rulemaking." Whether or not an interpretive ruling is issued under a statutorily-authorized ruling program, its issuance lacks the rigorous procedures that Congress has mandated for "legislative" type rules.

Ford Motor Credit Co. v. Milhollin, 444 U.S. 555 (1980)("*Ford*") does not support the government's claim for

judicial deference to non-legislative rulings. In *Ford*, a creditor asserted a defense grounded in reliance on a Federal Reserve Board staff interpretation of an agency regulation and the underlying statute. The staff interpretation was published in the Code of Federal Regulations and the statute expressly permitted creditors to assert their reliance on such interpretations as a defense against liability. The Court found in the statutory scheme a Congressional intent that Board interpretations be considered "authoritative," and thus accorded the published interpretation the deference traditionally shown to an agency's construction of its own, "highly technical" regulations.

Customs rulings, by contrast, display none of the attributes of the staff interpretation involved in *Ford*. As noted *infra*, reliance by private parties on Customs rulings is not permitted (as in *Ford*), but sharply limited. Customs rulings are not published in the *Customs Bulletin*, much less the Code of Federal Regulations. Moreover, there is no statutory indication that Congress intended Customs rulings to be "authoritative."[1]

In *United States v. Correll et ux.*, 389 U.S. 299 (1967)("*Correll*"), the Court reviewed the deference to be paid to a rule defining "sleep or rest" issued by the

---

[1]The government's citation to *Martin v. Occupational Safety & Health Review Comm'n* ("*Martin*") is unavailing, as that case concerned an agency's interpretation of its own validly-promulgated regulation rather than an interpretive ruling. Similarly, the "formally adopted 'guidelines'" that warranted deference in *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60 (1975)("*Train*"), were set forth in a legislative regulation, 421 U.S. at 70 and note 7. Thus, the question in *Train* was whether the agency's validly-promulgated regulations conformed with the statute, and the case did not involve any form of interpretive rule. Additionally, the Court held that "the Agency's interpretation" of the statute as reflected in the regulation "was 'correct,'" 421 U.S. at 87. Contrary to the government's argument, *Martin* and *Train* do not address the question of deference for interpretive rules, much less establish that such deference is due.

Commissioner of Internal Revenue. The Court of Appeals for the Sixth Circuit found that the Commissioner's rule was not "a valid regulation under the present statute." This Court reversed, finding that "Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law." *Id.* at 305-306 citing *Helvering v. Winmill*, 305 U.S. 79, 83; *Fribourg Nav. Co. v. Commissioner*, 383 U.S. 272, 283.

The differences between the "sleep or rest" rule reviewed in *Correll* and Customs rulings are readily apparent. The IRS rule in *Correll*, intended to have broad applicability to a wide range of persons, was in the same category as a legislative regulation. Customs rulings, by contrast, simply make conclusions that are limited to narrow facts presented in the ruling request, and are not intended to bind the public or furnish guidance to anyone other than the ruling's recipient. Moreover, the *Correll* case involved a longstanding, uniform and general interpretation of a statute which had been re-enacted or otherwise amended in a manner suggesting specific Congressional acceptance and approval of the interpretation. Such is not the case here.

In *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U.S. 111 (1944)("*NLRB*"), the Court reviewed an NLRB determination. As petitioner pointed out, the Court found that the agency's determination was "to be accepted if it has 'warrant in the record' and a reasonable basis in law." *Id.* at 131. What the petitioner did not provide was that the NLRB's determination was a record compiled before the agency by means of fact-finding, investigation and hearings, reviewable by the court. Customs ruling procedures contain no mechanism for gathering facts beyond those set out in the importer's ruling request, nor for compiling a formal administrative record which a court might consult or review.

Petitioner's reliance on *Zenith Radio Corp. v. United*

States, 437 U.S. 443 (1978), is similarly misplaced. In *Zenith*, the Court found that the Treasury Department's interpretation of the countervailing duty statute was to be afforded deference. However, the determination under review in *Zenith* was the product of a detailed administrative investigation which provided for the compilation of a record, public comment and hearings, and notice of the final determination was published in the *Federal Register*. Customs' rulings process lacks any of these procedural safeguards.

The statute on which the government places primary reliance, 19 U.S.C. § 1502(a), authorizes the Secretary of the Treasury to use various means to administer the Customs laws, including the promulgation of "rules and regulations," the issuance of pre-importation "rulings" and the dissemination of "information," as necessary. The Secretary's latitude in selecting the administrative tool for a particular purpose is not unfettered, but is rather limited by law. Nothing in 19 U.S.C. § 1502(a) suggests in any way that the Secretary has been freed from the requirement that a rule having the force and effect of law be promulgated through formal APA "notice and comment" rulemaking. *See Chrysler Corp. v. Brown*, 441 U.S. 281 (1979); *see also*, *American Frozen Food Inst. v. United States*, 855 F. Supp. 388 (Ct. Int'l Trade 1994)(Customs' "interpretive" country of origin marking ruling found to be a substantive "rule" requiring APA notice and comment prior to adoption). The government is here attempting to impose new rights and duties -- including a judicial duty of *Chevron* deference -- while bypassing the APA rulemaking procedures which Congress has prescribed for rules having such legislative effect.

Customs has issued APA-type legislative rules which incorporate legal interpretations, and these rightly command *Chevron* deference. *See*, *e.g.*, 19 C.F.R. Parts 10 (classification of goods under duty-free provisions), 152 (classification and appraisement of merchandise), 191 (duty

drawback). To grant deference to agency rulings which are not forged in the crucible of APA rulemaking procedures would weaken the APA and encourage agencies to circumvent it.

Chevron deference is grounded in the notion that Congress has delegated rulemaking power to be exercised by the agency. Congressional delegations, however, are not unrestricted, but are expressly conditioned on the agency's use of APA rulemaking. Where an agency has not followed Congress' prescribed path for exercising legislative power, judicial deference to the agency's action is unwarranted.

II. The *De Novo* Scope of Judicial Review of Customs Decisions Precludes Deference to Classification Rulings

The scope of judicial review in Customs classification cases[2] is set forth at 28 U.S.C. § 2640(a)(1), which provides that:

> (a) The Court of International Trade shall make its determinations upon the basis of the record made before the court in the following categories of civil actions:
>
> (1) Civil actions contesting the denial of a protest under

[2]Section 2640(a)(1) applies to cases that involve a denied protest, such as *Mead*. The statute requires that an importer first file a protest against an adverse Customs Service decision and, if its protest is denied, file a lawsuit in the Court of International Trade. 19 U.S.C. §§ 1514, 1515; 28 U.S.C. § 1581(a). The importer must follow this procedure regardless of whether Customs has issued a ruling concerning its merchandise; the decision that is on appeal is the protest denial, not the ruling (if any). In narrow circumstances, rulings may be the subject of pre-importation review on an administrative record outside the protest procedure, pursuant to 28 U.S.C. § 1581(h).

section 515 of the Tariff Act of 1930.

Pursuant to this directive, the court conducts a *de novo* proceeding, and may hold a trial for independent fact gathering. *Amity Leather Co. v. United States*, 20 Ct. Int'l Trade 1049, 1052, 939 F. Supp. 891, 894 (1996); *Customs Courts Act of 1980*, H.R. Rep. No. 96-1235, 96th Cong., 2d Sess. 59 ("[s]ubsection [2640](a)(1) provides for a trial *de novo* in the Court of International Trade in a civil action commenced pursuant to section 515 of the Tariff Act of 1930. This provision restates existing law").

Under the *de novo* review that was recodified in the 1980 Act, and which had obtained in previous decades, the courts provided no deference to Customs decisions denying protests, or to any rulings that may have underlain those decisions.[3] For example, in *C.J. Tower & Sons v. United States*, 33 Cust. Ct. 14, 17 (1954), the Customs Court, predecessor to the Court of International Trade, noted that:

> . . . the court's province is the construction of the tariff laws in the light of the intent of Congress in writing same . . . . The courts are not influenced by the interpretative rulings made for the guidance of Customs officers. But rather, the courts, as amply demonstrated in a long line of decisions, have been called upon to consider the legality of the acts of Customs officials.

Shortly thereafter — in the same year that the legislation that would become the Customs Courts Act of 1980 was introduced — the Customs Court issued a decision

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[3]Until 1980, the Customs Court's jurisdiction was premised exclusively on denial of a protest against a decision of the Customs Service.

explaining why it did not give deference to administrative determinations. *Michelin Tire Corp. v. United States*, 469 F. Supp. 270 (Cust. Ct. 1979)("*Michelin*"), involved a challenge to Customs' denial of an importer's protest against collection of countervailing duties pursuant to a Treasury Department determination.

The *Michelin* decision rejected the government's contention that the judicial role was limited to review on the agency record, or that any form of deference to the agency's legal conclusions was warranted:

> The court concludes that, within the subject matter jurisdiction granted to it by Congress, it is the *exclusive, unlimited and unrestricted forum for the determination of all issues of fact and law.* Its powers are unaffected by the manner in which some issues may have been decided on the administrative level.

469 F. Supp. at 274. [Emphasis added]. Specifically discussing actions commenced to challenge protest denials under 19 U.S.C. § 1514, the court noted that:

> This provision . . . does not contain any exclusions which would limit the inherent power of the court to decide all issues of fact and law before it. Moreover, § 1514(a) explicitly makes the legality of "all orders and decisions entering into the [decisions of the appropriate Customs officer]" subject to a civil action commenced in this court.

Id. at 280 (bracketed text in original). Accordingly, the court declined to "review" Treasury's decision under the limited and deferential APA standards, holding that the statutory directive for a civil action to be conducted *de novo* precluded the notion that limited APA review was even permissible.

Id. at 276, citing *Chandler v. Roudebush*, 425 U.S. 840 (1976).

The *Michelin* court's explication of its authority received implicit Congressional approbation in the *Customs Courts Act of 1980*. Although that Act created a new form of action for the review of countervailing duty determinations on the agency record, according to a deferential standard, it made no changes to the scope of review in protest denial cases. Indeed, the legislative history admonished that the *Customs Courts Act's* protest jurisdiction provision "restates existing law." H.R. Rep. No. 96-1235 at 59.

Congress was well aware of the *Michelin* decision at the time the *Customs Courts Act* was enacted. The legislative history for the *Trade Agreements Act of 1979*, in discussing changes in the scope and standard for judicial review of countervailing duty determinations, stated:

> The Treasury Department has consistently asserted that antidumping and countervailing duty determinations, unlike traditional value and classification decisions, are not subject to *de novo* review. A reading of the two recent countervailing duty decisions in the Customs Court relating to investigations of float glass from Italy and X-belted radial tires (Michelin) from Canada indicates that some differences of opinion exist with respect to the issue.
>
> Section 516A (codified at 19 U.S.C. § 1516a) would remove all doubt on whether *de novo* review is appropriate by excluding *de novo* review from consideration as a standard in antidumping and countervailing duty determinations.

Trade Agreements Act of 1979, S. Rep. No. 96-249, 96th Cong., 1St Sess. 251 (1979). Thus, the legislation removed

countervailing duty determinations from *de novo* review, but in no way disagreed with *Michelin's* conclusions regarding the breadth of the Customs Court's authority.

The *Customs Courts Act* and *Trade Agreements Act* should be read *in pari materia* and the drafters of the former should be considered aware of the latter's discussion of *Michelin*, as it related to an issue that was relevant in both pieces of legislation. Thus, the directive that then-new 28 U.S.C. § 2640(a) "restates existing law" had in its background Congressional awareness of *Michelin's* description of *de novo* authority as precluding deference to agency interpretive rulings.[4]

The analysis in *Michelin* comports with this Court's jurisprudence concerning the proper application of *de novo* review to a challenged administrative determination. For example, in *Salve Regina College v. Russell*, 499 U.S. 225, 238 (1991), the Court concluded that "[w]hen *de novo* review is compelled, no form of appellate deference is acceptable." In *Costarelli v. Massachusetts*, 421 U.S. 193,

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[4]The Court of International Trade is also charged by Congress with the duty to find the *correct* result in cases involving the classification of imported merchandise. See 28 U.S.C. § 2643(b), The Court of Appeals for the Federal Circuit ("CAFC"), has construed this mandate to mean that the it is the duty of the CIT to find the correct classification of imported merchandise regardless of Customs' position. *Jarvis Clark Co. v. United States*, 733 F.2d 873 (Fed. Cir. 1984) "[t]he trial court . . . must consider whether the government's classification is correct, both independently and in comparison with the importer's alternative. . . . The court's duty is to find the correct result, by whatever procedure is best suited to the case at hand." *Id.* at 878. While the CIT must accord a presumption of correctness to Customs' decision, 28 U.S.C. § 2639(a)(1), the legal determination embodied in the ultimate question in a classification case rests solely with the CIT. As the CAFC found, "our agreement with the opinion of the CIT does not extend to the suggestion that a routine classification dispute is entitled to special deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)." *Crystal Clear Industries v. United States*, 44 F.3d 1001, 1003 n.8 (Fed. Cir. 1995).

199 (1975)("*Costarelli*"), the Court rejected deference to a lower tribunal's legal conclusions as inconsistent with an action *de novo*: "Here, on the contrary, the review is not circumscribed so as to be narrower than normal appellate-type review on the record made in an inferior court, but is instead so broad as to permit de novo relitigation of all aspects of the offense charged, whether they be factual or legal." Although *Costarelli* concerned trial of a criminal matter in state court, the breadth of its definition of *de novo* review is equally applicable to Customs classification cases before the Court of International Trade.

Further evidence that Congress meant for *de novo* review in protest cases to preclude deference to Customs' legal interpretations may be gleaned by comparing 28 U.S.C. §§ 1581(a) and 2640(a) with 28 U.S.C. §§ 1581(h) and 2640(e). The former two provisions vest the Court of International Trade with jurisdiction over traditional protest denial actions, prescribing *de novo* review. The latter statutes address a new type of pre-importation judicial review of Customs rulings, which is available only in exceptional circumstances, and which requires the Court to review rulings on the basis of the administrative record, using a standard of review borrowed from the APA. *See* 5 U.S.C. § 706(2)(A). That Congress provided for a deferential standard of review in direct challenges to pre-importation rulings, but affirmed the historically non-deferential judicial review of protest cases, suggests powerfully that Congress deliberately withheld a preferential standard of review to protest actions.

In *United States v. First City Nat'l Bank*, 386 U.S. 361, 368-364 (1967)("*First City*"), the Court contrasted *de novo* proceedings with those limited to the agency record, and held that deference to agency views is inappropriate in the former.

> The critical words seem to us to be "de novo" and "issues presented." They mean to us that the court should make an independent

> determination of the issues. . . . But it is the court's judgment, not the Comptroller's, that finally determines whether the merger is legal.

The Court contrasted non-deferential proceedings under the *de novo* scope with the far more circumscribed "arbitrary, capricious or abuse of discretion" standard and indicated that Congress well understood the difference between the two when it passed the act in question.

The *Customs Courts Act of 1980* provided a similar dichotomy between section 1581(a) and 1581(h) cases. The novelty of direct review of a ruling occasioned extensive commentary in the legislative history, leaving no doubt that Congress was aware of the situation when it adopted section 1581(h). The government's position is that the two standards are indistinguishable, so that Customs rulings receive the same treatment in both *de novo* and "arbitrary, capricious and abuse of discretion" proceedings. As the *First City* decision provides, however, the two are very different, and the government's position would impermissibly conflate them. That Congress provided limited pre-importation review for rulings under 28 U.S.C. § 1581(h), while preserving the traditional non-deferential standard for traditional protest cases, strongly suggests that no deference is due Customs' decision in the instant "protest" case.

According traditional non-deferential *de novo* review to Customs classifications in "protest" cases is perfectly consistent with this Court's decision in *Haggar*, which held that *de novo* proceedings must take place against the backdrop of "controlling statutes, rules, and judicial precedents." *Haggar* at 391. *Haggar* involved a validly-promulgated "legislative" regulation, which had the force and effect of law. *See, Chrysler Corp. v. Brown*, 441 U.S. at 315-316. This case, in marked contrast, involves an agency interpretation that necessarily involved fact findings and legal conclusions and is subject to *de novo* challenge. In

quoting from Justice Scalia's statement that *de novo* proceedings are inconsistent with *Chevron*-style deference, *Haggar* recognized the continued distinction between *de novo* review and review on the agency record. *Haggar* at 391, quoting Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 515-516.

Thus, in *Haggar's* terms, the Customs ruling is not part of the "legal norms" to which a court must give effect. Rather, the court must determine the legality of the position set forth in the ruling itself in light of the applicable legal norms.

III. Deference To a Ruling Is Inconsistent With Proper Judicial Interpretation of the Tariff

It is a longstanding principle in classification cases that tariff provisions must be construed according to their common and commercial meanings, which are presumed to be the same. *See, United States v. Stone & Downer Co.*, 274 U.S. 225, 249 (1927). Common meaning is an issue of law, and its touchstones the subject of judicial knowledge; the courts routinely consult treatises and lexicons, and receive advisory expert testimony to guide their decisions.

Some classification determinations turn on the use to which a class or kind of goods is principally put. Similarly, in *Sonn v. Magone*, 159 U.S. 417, 421 (1895), the Court found that a product's "ordinary use, not occasional or subsequent use, furnishes the guide for classification." (Citations omitted). Moreover, the Court held, it was the judiciary's role to make the factual determination of what the "use" was:

> Whether the articles were properly classified as vegetables was a matter for the court to decide. The interpretation of words of common speech is within the judicial knowledge and matter of law.

Id. (Citations omitted).

Deference is generally accorded where an agency has a Congressionally-recognized expertise in a given subject area, or is called upon to make policy choices. However, tariff classification cases involve neither matters in which Customs has special expertise, nor matters of policy. The Harmonized Tariff Schedule of the United States ("HTSUS") is an enumeration of all physical objects, animate or inanimate, known to mankind. To suggest that Customs has special expertise in all matters of science and commerce germane to all of the items covered by the HTSUS is nonsensical; indeed, Customs has neither demonstrated nor claimed any special expertise with respect to the "diaries" which are the subject of the instant case. Classification of goods under the HTSUS involves no policy choices commended to agency discretion. Rather, classification is purely an exercise of statutory construction, performed according to empirical rules set forth in the General Rules of Interpretation of the tariff, the terms of the headings and any relative Section and Chapter Notes. Doubtful or difficult cases are often resolved by resort to judicially-developed canons of statutory construction. Tariff classification is purely an exercise in statutory construction, a task historically performed by reviewing courts.[5]

Where evidence of common or commercial

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[5]"It is well settled in Customs law that, when not otherwise defined in the [tariff schedule] or indicated by legislative history, the correct meaning of a term in a tariff provision is the common meaning understood in trade and commerce." *Schott Optical Glass v. United States*, 612 F.2d 1283, 1285 (C.C.P.A. 1979) (citations omitted). Although the "common meaning of a tariff term is not a question of fact but a question of law," "[i]n ascertaining the common meaning of a tariff term, the court may consult dictionaries, scientific authorities, and other reliable sources of information." *Id.* (citations omitted).

understanding, scientific meaning, or "principal use" are germane to tariff classification, the task of classification requires findings of fact — which the Court of International Trade is by statute compelled to make on the basis of a *de novo* record. An interpretive regulation and attendant deference may be appropriate to define a term that "has no well-defined meaning or common usage outside the perimeters" of a statute, *National Muffler Dealers Ass'n v. United States*, 440 U.S. 472, 476 (1979). By the same token, the judicial interpretation of a statutory term that is defined by its common meaning, rather than a meaning unique to the statute, should not be thus constrained. *Compare, Ford Motor Credit Co. v. Milhollin*, 444 U.S. at 566-67 (deference was warranted where agency interpreted "high[ly] technical" regulations).

IV. Customs Rulings are Statements of Agency Enforcement Intent, Issued for the Guidance of Customs Officials and the Public, and are Not Legislative-Type Regulations Deserving of Judicial Deference

While requiring *Chevron*-type judicial deference to legislative regulations adopted pursuant to notice-and-comment rulemaking, this Court has consistently declined to extend such deference to agency rulings which are "not subject to the rigors of the Administrative Procedure Act." *Reno v. Koray*, 515 U.S. 50, 61 (1995). Informal agency interpretations and guidelines have consistently been held "not entitled to the same deference as norms that derive from the exercise of the Secretary's delegated lawmaking powers," *Martin v. Occupational Safety and Health Review Comm'n.*, 499 U.S. 144, 157 (1991). While APA rulemaking by all Federal agencies is subject to strict procedural requirements mandated by Congress, including notice and comment (5 U.S.C. § 553), and direct judicial review to ensure that final rules are reasonable and in

accordance with law (*Id.*, Section 706), Congress has not imposed *any* requirements governing agencies' issuance of interpretive "rulings."

As a consequence, agency "rulings" programs vary considerably in scope, purpose, and the quality of the rulings issued. These variations, which stand in sharp contrast to uniform APA rulemaking procedures, explain why this Court has never accorded *Chevron* deference to interpretive rulings. Some agencies, such as the Internal Revenue Service, issue a relatively small number of interpretive rulings, all of which are written by the agency's headquarters office, and published in a single official publication of record. Customs, by contrast, issues thousands of rulings annually, in a sprawling, decentralized and often chaotic program whose operation shows precisely why *Chevron* deference is unwarranted and unwise.

The huge number of Customs interpretive rulings dwarfs the number issued by virtually any other Federal agency. As noted in the *amicus* brief of The Customs and International Trade Bar Association ("CITBA"), during the 12-month period from July 1998 to June, 1999, the number of Customs rulings issued was unofficially reported as 12,557 – 1,328 issued by Customs' Headquarters office (including 912 classification rulings) and 11,229 issued by the agency's field offices (including 10,986 classification rulings). In the same period, Customs Headquarters' Office of Regulations and Rulings ("OR&R") modified or revoked 165 such rulings.

The exact number of Customs rulings currently in effect is unknown, perhaps even by Customs itself. While Customs has a statutory duty to publish its rulings in the *Customs Bulletin*, or otherwise make them available for public inspection, (19 U.S.C. § 1625(a)), the agency has generally elected not to publish them,[6] nor to designate a

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[6]Customs' regulations (19 C.F.R. § 177.10(a)) repeat the statutory

private publisher of record. Several publishers offer unofficial compilations of Customs rulings. The July, 2000 edition of one unofficial publication, *Customs Info©*, published by Fuglei & Associates, contains 119,969 Customs rulings. (This number does not include the uncounted thousands of judicially reviewable protest decisions which Customs officers issue each year).

Given the sheer volume of Customs rulings, it is unsurprising that they are often not the product of thorough or expert legal interpretation. While Customs Headquarters rulings (about 10% of all rulings) are generally written by attorneys employed by Customs' ("OR&R"), and contain some degree of legal analysis, the vast majority of Customs rulings are prepared by the agency's National Import Specialist ("NIS") and Field National Import Specialist ("FNIS") staffs, who generally have no formal legal training. These rulings are often devoid of any discernible legal interpretation or reasoning, and are prepared under strict internal time constraints. *See* General Accounting Office, *U.S. Customs Service: Office of Regulations and Rulings Has Yet to Establish Performance Measures* (Testimony of JayEtta Z. Hecker to the Subcommittee on Trade, Committee on Ways and Means, House of Representatives), GAO-T-NSIAD-97-115 (noting that Customs had adopted, but not measured its compliance with, a 120-day time limit for the issuance of classification rulings by Headquarters, and a 30-day limit for the issuance of classification rulings by field offices).

The number of Customs rulings issued, and their

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command, but does not specify how, in the absence of publication in the *Customs Bulletin*, Customs makes rulings "available for public inspection". The regulation's statement that "[d]isclosure is governed by 31 C.F.R. Part 1, 19 C.F.R. Part 103, and 19 C.F.R. § 177.8(a)(3)," all of which refer to the Freedom of Information Act ("FOIA"), suggests that the initiation of a FOIA request by an interested party is the means by which Customs officially makes rulings available to public.

decentralized manner of preparation, strongly suggest that the rulings are intended as statements of agency enforcement intent and procedure, rather than as a body of administrative legal interpretation deserving judicial deference. Customs' program stands in contrast to the Revenue Rulings program administered by its sister Treasury Department agency, the IRS. During 1998 and 1999, respectively, the IRS issued only 62 and 58 Revenue Rulings. All of these rulings issued from a single body – the IRS' National Office – and were published in the *Internal Revenue Bulletin,* an official publication. *See* 26 C.F.R. § 601.201(6). Although this Court has held that APA-type agency regulations interpreting the Internal Revenue Code are entitled to *Chevron* deference, *Atlantic Mut. Ins. Co. v. Commissioner*, 523 U.S. 382, 389 (1998), it has pointedly ruled that IRS interpretative rulings "do not have the force and effect of regulations," *Commissioner v. Schleier*, 515 U.S. 323, 336 n.8 (1995), and has not accorded them *Chevron* deference.

While Section 625(a) of the Tariff Act of 1930, *as amended* (19 U.S.C. § 1625(a)) requires that Customs rulings be published in the *Customs Bulletin* or otherwise made available for public inspection, there is no official source to which the importing public can turn to consult or research such rulings. Customs does not publish its rulings officially, and has never designated a publisher of record; private publishing concerns offer selective, vastly different compendiums of Customs rulings.[7] As noted above *Customs Info©*, a CD-ROM service published by Fuglei & Associates, contains some 119,969 Customs rulings. As of August 15, 2000, Customs' internet website contained an unofficial compendium of 16,664 Headquarters Rulings and 48,568 "New York Rulings" (including Port Director rulings

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[7]Customs formerly made selected rulings available to the public, first in monthly booklets, and subsequently on microfiche and computer diskettes, but thereafter ceased all of these services.

made by the Field National Import Specialist staff). Other sources, such as LEXIS-NEXIS and Westlaw, have different numbers of Customs rulings in their databases.

Clearly, there is a "publications gap" between Customs' website and some of the commercial publications currently available. No compilation of rulings is official; none, apparently, is complete or comprehensive. This further undermines the notion that Customs rulings are a body of administrative lawmaking deserving of deference from the courts.

The available unofficial sources contain numerous unrevoked rulings which are either inconsistent with other rulings, superceded by subsequent judicial decisions, or both. For example, in *Customs Headquarters Ruling 088246 of November 30, 1990*, "hoodscarves," consisting of a length of acrylic knit fabric with a curved center seam, were classified by Customs under HTSUS subheading 6505.90.6080, as "hats and other headgear."[8] The ruling has never been revoked or modified, notwithstanding that, in *Totes, Inc. v. United States*, 16 Ct. Int'l Trade 796 (1992), the Court of International Trade ruled that an identical article was classifiable as a "scarf" under HTSUS heading 6117.[9]

Similarly, in *New York Customs Ruling 886130 of June 15, 1993*, and *Customs Headquarters Ruling 954758 of February 28, 1994*, the agency ruled that "taco shells" imported by Frito-Lay, Inc. were classifiable under HTSUS

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[8]*Customs Headquarters Ruling 088246 of November 30, 1990* was itself a result of the "modification" of *Customs Headquarters Ruling 086129 of March 6, 1990*, in which the hoodscarves were classified as knit scarves under HTSUS Heading 6117.

[9]Substantially identical rulings, issued to other importers, remain unrevoked, *See, Customs Headquarters Ruling 950559 of February 18, 1992; Customs Headquarters Ruling 085090 of October 11, 1989. Customs Headquarters Ruling 088201 of November 30, 1990; Customs Headquarters Ruling 085204 of October 11, 1989.* Indeed, on August 15, 2000, all of these rulings remained on Customs' website, and were also available in private publications.

subheading 1905.90.9090 as "other" bakers wares, and dutiable. Both rulings stand unrevoked, notwithstanding the Court of International Trade's unappealed decision in *Sabritas, S.A. de C.V.* and *Frito-Lay, Inc. v. United States*, 998 F. Supp. 1123 (Ct. Int'l Trade 1998), which classified the taco shells as "bread" under HTSUS subheading 1905.90.10, duty free.

Rulings remain unrevoked and unmodified even where Customs has changed its position on an issue without the benefit of judicial interpretation. Compare, for example, *Customs Headquarters Ruling 960556 of February 13, 1998* (classifying electronically-doped zinc sulfides under HTSUS subheading 3824.90.39) with *Customs Headquarters Rulings 950697 of February 19, 1992 and Customs Headquarters Ruling 950615 of January 22, 1992*, (both classifying electronically-doped zinc sulfides under HTSUS subheading 3206.50.00, and both of which remain unrevoked and unmodified).

Customs' failure to modify or annotate its rulings in response to court decisions or the agency's own change in position further indicates that the rulings are not intended as legislative-type interpretations of governing statutes, but rather as less formal statements of enforcement intent (in the case of pre-importation rulings) or administrative directions to Customs officers (in the case of pending transactions). Indeed, recipients of pre-importation rulings are required, under the Customs regulations, to include a copy of each ruling, or a reference thereto, with entry documents for the subject merchandise, to provide guidance to Customs officers concerning how the transaction should be handled. 19 C.F.R. § 177.8(a)(2). Customs Headquarters rulings concerning current or past transactions, such as Internal Advice Rulings, or Protest Review Decisions, are uniformly addressed to Customs officials at the ports(s) where the transactions are pending, who then take the actions specified in the rulings.

To the extent that rulings are intended as statements

of enforcement intent, or for internal guidance, there would be no need for Customs to revoke, modify or amend such rulings to reflect subsequent judicial actions. On the other hand, it would be bizarre to require courts to defer to an alleged body of administrative interpretation whose size, scope and accuracy cannot be established.

Limitations on importers' reliance on Customs rulings further refutes the notion that rulings are deference-worthy legal interpretations. Customs' regulations indicate that prospective rulings are issued "in the interest in the sound administration of the Customs and related laws," so that "persons engaging in any transaction affected by those laws fully understand the consequences of that transaction prior to its consummation." 19 C.F.R. § 177.1(a)(1). Rulings may contain "with respect to a specifically described transaction, a definite interpretation of applicable law or other appropriate information." *Id.*

Customs rulings apply only to a specific "Customs transaction," that is, "an act or activity to which the Customs and related laws applies," which must be described in ruling requests "in sufficient detail to permit the proper application of relevant Customs and related laws." Once a ruling letter is issued, it represents "the official position of the Customs Service *with respect to the particular transaction or issue described therein* and is binding on all Customs Service personnel in accordance with the provisions of this Section until modified or revoked." *Id.*, Section 177.9(a) (emphasis added). Application of a ruling to an actual transaction is "subject to the verification of the facts incorporated in the ruling letter, a comparison of the transaction described therein to the actual transaction and the satisfaction of any condition on which the ruling was based". *Id.*, Section 177.9(b). Classification rulings apply "only with respect to transactions involving articles identical to the sample submitted with the ruling request or to articles whose description is identical to the description set forth in the ruling letter." *Id.*, Section 177.9(b)(2). Rulings, once issued,

are subject to modification or revocation without notice to any person except the person to whom the ruling was addressed. *Id.*, Section 177.9(c).

The Customs regulations expressly caution that no other person should rely on the ruling letter that *"or assume that the principles of that ruling will be applied in connection with any transaction other than the one described in the letter."* *Id.* (emphasis added). The fact that persons may not even assume that "the principles" of a ruling will be applied to any other situation confirms that rulings are not intended as definitive statements of the agency's legal interpretation. While binding on Customs officials, rulings do not limit the importer's ability to protest a Customs decision taken in accordance with, or in reliance upon, such ruling, nor do rulings limit an importer's power to seek judicial review of Customs decisions.

Customs rulings direct agency employees concerning how particular transactions are to be handled, but do bind the agency institutionally. Customs retains the power to change its legal views for any reason, and is not bound to follow the position taken in rulings when cases are presented for adjudication. Revocation or modification of a ruling rests entirely within Customs' discretion, and does not even require a predicate finding by the agency that the ruling is legally erroneous. "[A]ny ruling letter found to be in error *or not in accordance with the current views of the Customs Service* may be modified or revoked," 19 C.F.R. § 177.9(d).

Unlike APA-type legislative rules, which are binding on agencies and the public alike, Customs rulings may be freely disavowed by the agency in litigation. Customs' protest decisions (which presumably incorporate and reflect the agency's ruling concerning how a transaction should be handled) enjoy a statutory presumption of correctness when challenged in the courts. *See,* 28 U.S.C. § 2639(a)(1). However, in litigation, Customs can, and frequently does, abandon positions taken in rulings, raising alternative claims for classification under other provisions of the tariff. *See*

e.g., *Rollix Bearing Inc. v. United States*, 757 F. Supp. 1412 (Ct. Int'l Trade 1991)(alternate claims not entitled to presumption of correctness, but may be asserted). The agency is even free to assert a counterclaim, seeking a greater rate of duty than assessed in liquidation of the entry. *See, e.g.*, 28 U.S.C. § 1583. The fact that Customs rulings, unlike APA rules, can be "discarded at the courthouse door" at the agency's whim, further suggests that rulings are not binding interpretations of law entitled to deference.

Section 625(c) of the *Tariff Act of 1930* (codified at 19 U.S.C. § 1625 (c)), requires Customs to provide notice, in the *Customs Bulletin*, of the proposed and final revocation of rulings, to provide for comment by interested parties, and delays the effective date of new rulings for 60 days from their issuance. These requirements, however, do not transform even this limited subset of "revoked" or "modified" rulings into APA-type rules. Rather, they merely reflect Congress' acknowledgment that importers who have received a statement of enforcement intent from Customs in the form of a written ruling, and who have entered into transactions in reliance thereon, have a protectable reliance interest in such rulings, and should not be subjected to sudden or retroactive changes in treatment when rulings are modified or revoked.

Significantly, Section 625(c) does not provide any standards to guide Customs in determining whether to modify or revoke a ruling, but leaves the matter entirely to the agency's discretion. Unlike the APA, Section 625(c) does not provide for judicial review of the final ruling.[10]

The chaotic and disordered way in which Customs rulings are issued demonstrates why rulings in general, and

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[10]Judicial review is only available to the extent that the new ruling may be used as the basis for Customs' final disposition of a protest (in which case, the importer can seek *de novo* judicial review under 28 U.S.C. § 1581(a)) or in the very limited instances where pre-importation review is available under 28 U.S.C. § 1581(h).

Customs rulings in particular, do not deserve the mandatory deference prescribed by *Chevron* for administrative rulemaking which involves the exercise of legislative authority delegated by Congress. As an alternative to *Chevron* deference, the petitioner seeks a minimum of *Skidmore* deference or "respect" for its rulings.[11] *See*, Pet'r Br. at pp. 16-17, 31-33. The Court should find that Customs' rulings are not even entitled to *Skidmore* deference. Due to the manner in which Customs makes its rulings available to its own personnel and to the public, a *Skidmore*-type review is not possible; and, for that reason, this Court should find that Customs rulings are not entitled to such deference.

Skidmore deference presumes the ability of a court to determine the rationale for an agency's determination, the consistency of the agency's position, and the reasoning, if any, for an agency's change in its position. As a practical matter, for a court to perform that analysis, a formal body of rulings must exist. In that regard, this Court stated in *Skidmore*:

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do *constitute a body of experience and judgment* to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking the power to control.

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[11]*Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

323 U.S. at 140 (emphasis added).

As noted above, there is no official body of Customs rulings to which the Customs courts may apply a *Skidmore* analysis; no official, or even unofficial list, of the rulings exists. The agency's rulings are frequently conclusory, furnishing no legal analysis, and are not maintained in a current fashion. To require judicial deference to a body of administrative law assumes that the body of law can be identified and analyzed; this minimal condition cannot be satisfied in the case of Customs rulings. In short, the Customs ruling program offers a textbook example of why across-the board judicial deference to administrative rulings, whether under the *Chevron* or *Skidmore* iterations, is not appropriate.

CONCLUSION

For the foregoing reasons, amicus curiae respectfully ask this Court to affirm the judgment of the United States Court of Appeals for the Federal Circuit.

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No. 99-1434

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

THE MEAD CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF TAX EXECUTIVES INSTITUTE, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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IN THE

Supreme Court of the United States

No. 99-1434

UNITED STATES OF AMERICA,
Petitioner,

v.

THE MEAD CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF TAX EXECUTIVES INSTITUTE, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

Pursuant to Rule 37 of the Rules of the Supreme Court, Tax Executives Institute, Inc. respectfully submits this brief as *amicus curiae* in support of Respondent.[1] Tax Executives Institute (hereinafter "TEI" or "the Institute") is a voluntary,

[1] Pursuant to Rule 37.6, *amicus* TEI states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Tax Executives Institute has received the written consents of Petitioner and Respondent to the filing of this brief; those consents have been filed with the Clerk of the Court.

nonprofit association of corporate and other business executives, managers, and administrators who are responsible for the tax affairs of their employers. The Institute was organized in 1944 and currently has approximately 5,200 members who represent nearly 2,800 of the leading businesses in the United States, Canada, and Europe.

The members of the Institute represent a cross-section of the business community in North America. The Institute is dedicated to promoting the uniform and equitable enforcement of the tax laws and to reducing the costs and burdens of administration and compliance to the benefit of both the government and taxpayers.

This case revolves around the deference granted classification rulings issued by the Customs Service. But it is not merely a Customs case. It is a case involving fundamental questions of administrative law. In reviewing interpretative rulings by a federal agency—such as the Customs Service—how much should a court defer to the agency's interpretation of the law? In its decision below, the United States Court of Appeals for the Federal Circuit held that classification rulings are not entitled to deference under the Supreme Court's seminal decision in *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In reaching that decision, the Federal Circuit reasoned by analogy to revenue rulings issued by the Internal Revenue Service (IRS), noting that such "interpretive rulings . . . do not have the force and effect of regulations." The parallels between Customs rulings and IRS rulings, neither of which is subject to the notice-and-comment process, convinced the circuit court that Customs rulings "do not require *Chevron* deference."

This case is manifestly important to companies that import goods into the United States. It has broader ramifications, however, for other agency interpretations, including those by the IRS. As the individuals who must contend daily with the interpretation and administration of the nation's tax laws,

TEI's members have a vital interest in the deference to be accorded IRS interpretative rules by the courts. The decision will affect the balance between the orderly and reasonable administration of a statute and potentially unchecked and even arbitrary agency power. Many TEI members have first-hand knowledge that an agency may seek to bolster its litigating position by issuing rulings, *even after a case has been docketed in the courts*. Meaningful, albeit measured, judicial review of agency interpretative rulings is critical in safeguarding the public from unreasonable agency actions. Because TEI members and the businesses by which they are employed will be materially affected by the Court's decision in this case, the Institute has a special interest in the outcome.

SUMMARY OF ARGUMENT

1. This case involves a fundamental question of administrative law. In reviewing interpretative rulings by a federal agency, how much should a court defer to the agency's interpretation of the law? In its decision below, the United States Court of Appeals for the Federal Circuit held that Customs classification rulings are not entitled to deference under the Supreme Court's seminal decision in *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Federal Circuit's decision is correct.

The issue of the deference to be accorded an agency's interpretative ruling requires a careful balance and the answer properly depends on the extent of public involvement in the development of the agency rule. *See Christensen v. Harris County*, 120 S. Ct. 1655, 1662 (2000). To be sure, administrative agencies develop expertise in the subject matters within their jurisdiction, but the public has an indispensable role to play in ensuring that an agency is well informed and its position does not overreach. Simply stated, without notice and comment, an agency's decision could become capricious. Without meaningful judicial review of interpretative rules,

agencies could arrogate to themselves the power to unreasonably interpret or apply the law. A careful balance must be struck, and the courts are properly wary of deferring too much to agency interpretative rulings. *Amicus* TEI submits that the Federal Circuit struck the proper balance here and that its decision on the deference to be granted to the Customs Service's classification ruling fully accords with this Court's decisions in *Chevron* and subsequent cases.

2. In *Chevron*, this Court established a two-step test for determining the deference to be afforded interpretative rules by the courts. First, the court must review the intent of Congress. If it is clear, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." If Congress has not directly addressed the matter, however, the question becomes whether the agency's answer is based on a permissible construction of the statute. 467 U.S. at 842-83. If the regulatory scheme is a "reasonable accommodation of manifestly competing interests," the agency's interpretation is entitled to deference. *Id.* at 865.

In *United States v. Haggar Apparel Co.*, 526 U.S. 380 (1999), the Court applied the *Chevron* standard in determining the deference to be accorded regulations relating to the Customs classification of certain imported goods, analogizing Customs regulations to tax regulations. The Court found that—in light of the Customs Service's use of the notice-and-comment rulemaking process—the regulations at issue were entitled to *Chevron* deference. 526 U.S. at 394.

Rulings are not, however, the same as regulations. In its analysis of this case, the Federal Circuit looked to the deference to be accorded revenue rulings issued by the Internal Revenue Service, noting that the parallels between IRS and Customs rulings convinced it that "the latter, like the former, do not require *Chevron* deference." The Federal Circuit's

analysis of the deference owed to Customs and IRS interpretative rulings is correct.

3. Under *Chevron* and *Haggar*, not all agency rulemaking is entitled to deference. Only four months ago, the Court properly declined to extend such deference to an opinion letter issued by the U.S. Department of Labor. *See Christensen*, 120 S. Ct. at 1662-63. The Court explained that the interpretation at issue was "not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking" and thus did not warrant *Chevron* deference. *Id.* at 1662.

Like the opinion letter at issue in *Christensen*, Customs classification rulings (such as the one at issue here) and IRS revenue rulings are not subject to notice and comment and are not published in either the Federal Register or the *Code of Federal Regulations*. These safeguards are required by the Administrative Procedure Act (APA) to afford an opportunity for interested persons to comment on agency interpretations before they become final. 5 U.S.C. § 553 (1994). Public participation in an agency's rulemaking process is important for two reasons. First, the combined expertise of the agency and the public produces better rules, and second, the procedure enables interested parties to express their views to agency officials who are not directly accountable to the voters.

Amicus TEI submits that the discipline and openness engendered by the notice-and-comment procedure deter casual or arbitrary action, forestall confusion, and ultimately produce more effective regulations, all to the benefit of the government and the public. This same process is not normally followed with interpretative rules such as Customs classification rulings and IRS revenue rulings, and accordingly a higher quantum of judicial scrutiny is appropriate to counterbalance the absence of notice and comment.

A Customs Service (or IRS) ruling should not be treated as a policy decision that courts must accept if it is minimally ra-

tional. To do so would permit and perhaps even encourage agencies to circumvent the intent of Congress because it is more expedient to create rules without public scrutiny. Equally troublesome, according *Chevron* deference to interpretative rulings may encourage the agencies to issue rulings to improve the likelihood of success in litigation.

Regulations and interpretative rulings are not the same. In the case of regulations, *Chevron* deference may be sensible because the public has participated in the rulemaking process. In contrast, in respect of interpretative rulings, judicial scrutiny must serve as a counterbalance to the lack of public participation in the process. Thus, the Federal Circuit correctly determined that *Chevron* deference should not be extended to standard Customs Service rulings.

4. What is the correct standard to be applied to Customs classification rulings? Following this Court's lead in *Haggar*, the Federal Circuit looked to the standard utilized in analyzing IRS revenue rulings. The appeals court found that Customs classification rulings, like IRS revenue rulings, were not entitled to deference. Its reasoning should be sustained.

Although an official interpretation of the IRS, revenue rulings are limited to the facts under consideration and are not published in the *Federal Register* or the *Code of Federal Regulations*. Most recently, in *Commissioner v. Schleier*, 515 U.S. 323 (1995), the Court wisely noted that the IRS's rulings do not have the force and effect of regulations, and "may not be used to overturn the plain language of a statute." *Id.* at 336 n.8.

IRS revenue rulings are mere litigating positions and not entitled to any deference. This is not merely the view of *amicus* TEI, but, more important, it is the view adopted by the United States Tax Court, a court uniquely qualified to assess the efficacy of IRS pronouncements. According to the Tax Court, a revenue ruling represents the Commissioner's position with respect to a specific factual situation and is merely the opinion of a lawyer in the agency. Thus, rulings are not binding on the courts and are only as persuasive as the IRS's reasoning and the precedents upon which the agency relies.

The Tax Court's position is consistent with this Court's holding in *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), that deference to "an agency's convenient litigating position" is "entirely inappropriate." *Id.* at 213. *Amicus* TEI submits that, given the similarity between IRS revenue rulings and Customs classification rulings, the Federal Circuit correctly held that neither should be accorded any deference.

5. Alternatively, if the Court concludes that an intermediate level of deference should be accorded Customs rulings, the proper standard may be found in this Court's decision in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), *i.e.*, "a body of experience and informed judgment to which courts and litigants may properly resort for guidance." Applying *Skidmore* here would place the burden of persuasion on the agency to convince the court of the meaning of the relevant statute. It would also encourage agencies to issue clear regulations, while acknowledging that an agency may have superior insights into regulatory meaning.

This case provides an opportunity for the Court to clarify the standard for reviewing agency interpretations. *Amicus* TEI respectfully submits that the courts according *Chevron* deference to such rules have inappropriately distended the doctrine. Applying *Skidmore* to interpretative rules such as those involved here will provide needed guidance to the lower courts and reserve *Chevron* deference, at most, to substantive rules subject to the notice-and-comment process.

Like the opinion letter in *Christensen*, agency interpretations contained in Customs classification and IRS revenue rulings should be "entitled to respect," but only to the extent

that those interpretations have the "power to persuade." The Federal Circuit found the Customs classification ruling in this case unpersuasive. Its opinion should be affirmed.

ARGUMENT

I.

Customs duties are imposed on imported goods in accordance with the Harmonized Tariff Schedules of the United States (HTSUS), 19 U.S.C. § 1202 (Supp. IV 1998). This case involves whether five categories of Respondent Mead Corporation's loose-leaf day planners (sometimes called "Filofaxes") should be assessed as a "bound diary" under subheading 4820.10.20 of the HTSUS or comes under the "other" provision of subheading 4820.10.40. The outcome—which will cause the tariff to be either zero or up to four percent—turns on the deference accorded rulings of the U.S. Customs Service under this Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

In an interpretative ruling dated January 11, 1993, the Customs Service classified Mead's day planners as bound diaries subject to a four-percent tariff. Headquarters Ruling 955937, 1994 WL 712863 (Customs), *reprinted at* App. 28a-47a.[2] Mead sought review in the Court of International Trade, which affirmed the Customs Service's classification. (App. 19a-27a.) The United States Court of Appeals for the Federal Circuit reversed, holding that the day planners were neither "diaries" nor "bound" under common and commercial definitions of the terms. (App. 1a-16a.) Applying the standard set forth in *Chevron*, as recently interpreted by this Court in *United States v. Haggar Apparel Co.*, 526 U.S. 380 (1999),

[2] References to "App." are to the appendix filed with the United States' Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit.

the Federal Circuit found that the Customs Service ruling issued to Mead was not entitled to deference. (App. 6a-7a.) This Court subsequently granted the government's petition for a writ of certiorari to consider two issues:

- Whether classification rulings issued by the Customs Service are entitled to deference in determining the proper tariff classification of imported goods, and
- Whether the Customs Service reasonably interpreted the statutory phrase "diaries, notebooks, and address books, bound" in subheading 4820.10.20 of the HTSUS to include the spiral-ring and ring-bound day planners imported by Mead.

Amicus TEI's interest is with the first issue, for the question of the courts' deference to agency pronouncements lies at the heart of administrative law. The issue requires a careful balance, and the answer properly depends on the extent of public involvement in the development of the agency rule. *See Christensen v. Harris County*, 120 S. Ct. 1655, 1662 (2000). To be sure, agencies develop expertise in the subject matters within their jurisdiction, but the public has a vital role to play in ensuring that an agency is well informed and its positions do not overreach. The importance of the notice-and-comment process in aiding an agency's efforts to administer a statute in a reasonable manner and preventing arbitrary actions cannot be overstated. Simply stated, without notice and comment, an agency's decision could be capricious. Without meaningful judicial review of interpretative rules, agencies could arrogate to themselves the power to unreasonably interpret or apply the law. Thus, a careful balance must be struck, and the courts are properly wary of deferring too much to agency interpretative rulings. *Amicus* TEI submits that the Federal Circuit struck the proper balance. Its decision on the deference to be granted to the Customs Service's classifica-

tion ruling fully accords with this Court's decisions in *Chevron* and subsequent cases and should be affirmed.

II.

Chevron has been called "one of the most important decisions in the history of administrative law." 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.2, at 110 (3d ed. 1994) (hereinafter cited as "DAVIS & PIERCE"). In that case, the Court considered the Environmental Protection Agency's construction of the Clean Air Act and set forth the following standard of review:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

467 U.S. at 842-83 (footnote omitted). The Court noted that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Id.* at 844. Because the Court viewed the regulatory scheme in *Chevron* to be a "reasonable accommodation of manifestly competing interests," it held that the agency's interpretation was entitled to deference. *Id.* at 865.

Subsequently, in *Haggar*, the Court applied this standard in determining the deference to be accorded regulations relating to the Customs classification of certain imported goods,

analogizing Customs regulations to tax regulations. 526 U.S. at 394 (citing *Atlantic Mutual Insurance Co. v. Commissioner*, 523 U.S. 382, 389 (1998) (when a term in the Internal Revenue Code is ambiguous, "the task that confronts us is to decide, not whether the Treasury *regulation* represents the best interpretation of the statute, but whether it represents a reasonable one." (emphasis added)). The Court then found that—in light of the Customs Service's use of the notice-and-comment rulemaking process—the regulations at issue were entitled to *Chevron* deference. 526 U.S. at 394.

The *Chevron* and *Haggar* decisions, however, do not mean that all agency rulemaking is entitled to deference. Indeed, not according deference to the Customs ruling here at issue is wholly consistent with those decisions. The Federal Circuit explained that, unlike the regulations at issue in *Haggar*, ordinary classification rulings do not have the force of law and are not issued with procedural safeguards such as public notice and comment. (App. 6a-7a.) The court held that the Customs Service's classification ruling did not warrant the deference owed to regulations that "fill[] a gap or define[] a term" of an ambiguous HTSUS provision. (App. 5a.) In reaching this conclusion, the court relied heavily on the deference standard applied to revenue rulings issued by the Internal Revenue Service (IRS). Citing *Commissioner v. Schleier*, 515 U.S. 323 (1995), the court noted that IRS rulings do "not have the force and effect of regulations." It concluded that "the parallels between IRS Revenue Rulings and Customs rulings further convince this court that the latter, like the former, do not require *Chevron* deference." (App. 8a.) The Federal Circuit's analysis of the deference owed to Customs and IRS interpretative rulings is correct.

III.

Not all agency interpretations are entitled to *Chevron* deference. Only four months ago, the Court properly declined to

extend such deference to an opinion letter issued by the U.S. Department of Labor. In *Christensen*, the Court noted that the interpretation at issue was "not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking." 120 S. Ct. at 1662-63. Labor Department opinion letters—like interpretations set forth in policy statements, agency manuals and enforcement guidelines, all of which lack the force of law—thus do not warrant *Chevron* deference. *Id.* at 1662 (citing *Reno v. Koray*, 515 U.S. 50, 61 (1995) and other cases).

Like the opinion letter at issue in *Christensen*, Customs classification rulings (such as the one at issue here) and IRS revenue rulings are not subject to notice and comment and are not published in either the *Federal Register* or the *Code of Federal Regulations*. As such, they are an agency interpretation that should not be given "the force and effect of regulations." *Cf. Schleier*, 515 U.S. at 336 n.8 (quoting *Davis v. United States*, 495 U.S. 472, 484 (1990)).[3]

As the Federal Circuit recognized below (App. 5a-6a), the Administrative Procedure Act (APA) generally requires publication of a notice of proposed rulemaking, an opportunity for interested persons to comment, and a hearing before the adoption of "legislative" regulations, *i.e.*, regulations specifically authorized by statute. 5 U.S.C. § 553 (1994). The legislative history confirms what is apparent from the face of the statute: Section 553's principal purpose is "to provide that the legislative functions of administrative agencies shall so far as possible be exercised only upon public participation on notice." H.R. REP. NO. 1980, 79th Cong., 2d Sess. 23 (1946). To ensure the effectiveness of those safeguards, "notice must

[3] Moreover, the IRS does not claim for revenue rulings the force and effect of Treasury Department regulations. Rev. Proc. 89-14, § 7.01(4), 1989-1 C.B. 814, 815 ("Revenue rulings published in the [Internal Revenue] Bulletin do not have the force and effect of Treasury Department regulations (including Treasury Decisions) . . .").

be sufficient to fairly apprise interested parties of the issues involved, so that they may present responsive data or argument relating thereto." S. REP. NO. 752, 79th Cong., 1st Sess. 14 (1945). An exception is provided from the notice-and comment requirements, however, for agency interpretative rules. 5 U.S.C. § 553(b)(3)(A) (1994).

Public participation in an agency's rulemaking process is important for two reasons. First, the combined expertise of the agency and the public produces better rules since public input leaves the agency better informed and may offset any institutional bias for or against a particular rule. Second, the procedure guarantees an open process by enabling interested parties to express their views to agency officials who are not directly accountable to the voters. Thus, opportunities for closed-door or back-room deals can be minimized. *See generally* Linda Galler, *Judicial Deference to Revenue Rulings: Reconciling Divergent Standards*, 56 OHIO ST. L.J. 1037, 1086 (1995) (hereinafter cited as "Galler").

Organizations such as *amicus* TEI frequently comment on proposed regulations and its members' experience and expertise are often sought by the Treasury Department and IRS, particularly in administrative matters involving large corporations. *Amicus* TEI submits that the discipline and openness engendered by the notice-and-comment procedure deter casual or arbitrary action, forestall confusion, and ultimately produce more effective regulations, all to the benefit of the government and the public alike.

For example, the IRS and Treasury Department recently issued proposed regulations under section 411(d)(6) of the Internal Revenue Code (26 U.S.C.), relating to the technical requirements for qualified retirement plans. Comments submitted by *amicus* TEI and others to the IRS in response to an earlier notice were reflected in the proposed rulemaking and additional assistance was requested on several outstanding issues. *See Notice of Proposed Rulemaking and Notice of Pub-*

lic Hearing: Special Rules Regarding Optional Forms of Benefit under Qualified Retirement Plans, 65 Fed. Reg. 16546 (March 29, 2000), *reprinted in* 2000-16 I.R.B. 903 (April 17, 2000). Although the IRS and Treasury Department are still reviewing comments on the proposed regulations, *amicus* TEI predicts that the final regulations will be better reasoned—and the public will be better served—as a result of the notice-and-comment process.

This same process is not normally followed with interpretative rules such as Customs classification rulings and IRS revenue rulings,[4] and a higher quantum of judicial scrutiny is appropriate to counterbalance the absence of notice and comment. "It would be contrary to the intent of the APA (and thus of Congress) to permit an agency to do by interpretive rule what Congress intended it to do by legislative rulemaking. For the court to then defer to the 'agency's answer' where that answer is an interpretive rule would be not only contrary to congressional intent but also a neglect of judicial duty in reviewing agency determinations under 5 U.S.C. section 702." *Johnson City Medical Center v. United States*, 999 F.2d 973, 979-80 (6th Cir. 1993) (Batchelder, J., dissenting) (footnote omitted). Allowing public comment before a ruling is issued keeps the agency open-minded and flexible. *See National Tour Brokers Association v. United States*, 591 F.2d 896, 902 (D.C. Cir. 1978) ("People naturally tend to be more close-minded and defensive once they have made a 'final' determination." (footnote omitted)).

A Customs Service (or IRS) ruling should not be treated as a policy decision that courts must accept if it is minimally rational. To do so would permit and perhaps even encourage agencies to circumvent the intent of Congress because it is

[4] Although not required to do so by the APA, the Treasury Department normally follows the APA notice-and-comment procedures in respect of interpretative tax regulations. MICHAEL I. SALTZMAN, IRS PRACTICE AND PROCEDURE ¶ 3.02[3] (2d ed. 1991).

more expedient to create rules without public scrutiny. It would also facilitate the issuance of vague or one-sided regulations, which the agency could later interpret to its own end. *See Thomas Jefferson University v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting) ("It is perfectly understandable, of course, for an agency to issue vague regulations, because to do so maximizes agency power and allows the agency greater latitude to make law through adjudication, rather than through the more cumbersome rulemaking process."); *Caruso v. Blockbuster-Sony Music Entertainment Centre*, 174 F.3d 166, 174 (3d Cir. 1999) ("It is certainly not open to an agency to promulgate mush and then give it concrete form only through subsequent less formal 'interpretations.' " (citation omitted)).

Equally troublesome, according *Chevron* deference to interpretative rulings may encourage agencies such as the Customs Service and the IRS to issue rulings to improve the likelihood of success in litigation. *See, e.g., Stubbs, Overbeck & Associates, Inc. v. United States*, 445 F.2d 1142, 1147 (5th Cir. 1971) (refusing to follow a revenue ruling because it was not a reasonable interpretation of the statute and appeared as if the "drafter of the Ruling did a bit of legislating for the convenience of the IRS"); *Tandy Corp. v. Commissioner*, 92 T.C. 1165, 1170 (1989) (refusing to follow a revenue ruling because it represented "a thinly veiled attempt to influence this litigation, judging from the similarity of the facts and the timing of its issuance"). The Tax Court and other courts have routinely looked upon "bootstrapping revenue rulings" with disfavor. *Id.; Ludwig v. Commissioner*, 68 T.C. 979, 986 n.4 (1977). *See also Fribourg Navigation Co. v. Commissioner*, 383 U.S. 272, 279-81 (1966); *Busse v. Commissioner*, 419 F.2d 1147, 1152 n.12 (7th Cir. 1973).

If the Court extends the *Chevron* deference standard to administrative rulings such as those issued by the Customs Service or the IRS, it will imbue those pronouncements with

the same status as regulations. Although the government attempts to blur the distinction between legislative regulations and interpretative rulings,[5] they are not the same. In the case of regulations, *Chevron* deference may be salutary because the public has participated in the rulemaking process. It makes no sense, however, in respect of interpretative rulings. Judicial scrutiny must counterbalance the lack of public participation in the process. Thus, the Federal Circuit's determination that *Chevron* deference should not be extended to standard Customs Service rulings is correct.[6]

IV.

What *is* the correct quantum of deference for Customs classification rulings? Following this Court's lead in *Haggar*—which noted the similarity of trade and tax issues—the Federal Circuit looked to the standard utilized in analyzing IRS revenue rulings. (App. 7a-8a.) After reviewing the applicable Treasury Regulations and case law, the appeals court found that Customs classification rulings, like IRS revenue rulings, were not entitled to deference. The Federal Circuit's analysis of IRS revenue rulings is well founded[7] and should

[5] Brief for the Petitioner United States, *United States v. Mead Corp.* (No. 19-1434) at 19-20.

[6] This is not to say that Customs classification and IRS revenue rulings have no value. The rulings give the public notice of agency positions and promote consistency. These attributes, however, do not mean that the rulings should be granted the same status as regulations where public comment has been sought before issuance. *See* Galler at 1045-46.

[7] The proper standard of deference to be accorded revenue rulings has led to confusion, with courts adopting divergent standards. *See, e.g., Estate of Kosow v. Commissioner*, 45 F.3d 1524, 1528 n.4 (11th Cir. 1995) (holding that revenue rulings are merely an opinion of an IRS attorney); *Johnson City Medical Center*, 999 F.2d at 976 (finding "some deference"); *Gillespie v. United States*, 23 F.3d 36, 39 (2d Cir. 1994) (granting "great deference"); *First Chicago NBD Corp. v. Commissioner*, 135 F.3d. 457, 459 (7th Cir. 1998) (granting "some weight"). One commentator has suggested that generalist judges may be more willing to accept IRS revenue rulings "simply because they prefer to leave tax cases alone." Galler at 1077.

serve as the standard for analyzing Customs classification rulings.

Revenue rulings are issued under the general grant of authority set forth in section 7805(a) of the Internal Revenue Code (26 U.S.C.), which gives the Treasury Department authority to prescribe "all needful rules and regulations." Although a ruling is an official interpretation of the IRS, the vast majority are adopted without public comment. 26 C.F.R. § 601.601(d)(2)(*b*)(v)(*f*) (2000) (comments may be solicited, but only if justified by "special circumstances"). Rulings are limited to the facts under consideration and may be changed by subsequent legislation, regulations, court decisions, or even other rulings. 26 C.F.R. §§ 601.601(d)(2)(*b*)(v)(*a*), (*e*) (2000). They are not published in the *Federal Register* or the *Code of Federal Regulations*. *See* 26 C.F.R. § 601.601(d)(1) (2000).[8]

This Court has not definitively ruled on the deference to be accorded modern IRS revenue rulings, though in early cases they were found to be of "little aid" in interpreting the tax laws because they were not subject to Treasury Department review. *See, e.g., Biddle v. Commissioner*, 302 U.S. 573, 582 (1938) (citing *Helvering v. New York Trust Co.*, 292 U.S. 455, 468 (1934)). Most recently, in *Commissioner v. Schleier*, the Court considered a taxpayer argument that the liquidated damages received under an Age Discrimination in Employment Act claim should be excluded from gross income as "damages received . . . on account of personal injuries or sickness" under section 104(a)(2) of the Internal Revenue Code (26 U.S.C.). 515 U.S. at 327. The taxpayer

[8] The court below also noted that in some ways Customs classification rulings are a less formal interpretation than revenue rulings because the latter are issued by the IRS's National Office, while the former may also be issued by a port office. (App. 7a-8a.)

claimed that under a Treasury Regulation the damages were amounts received based upon "torts or tort type rights" and therefore non-taxable. In support of her position, the taxpayer cited a revenue ruling. Recognizing that the ruling seemed to rely upon the same reading urged by the taxpayer, this Court stated that the IRS's " 'interpretive rulings do not have the force and effect of regulations,' and they may not be used to overturn the plain language of a statute." *Id.* at 336 n.8 (citing *Davis v. United States*, 495 U.S. 472, 484 (1990)).[9] *See also Commissioner v. Keystone Consolidated Industries, Inc.*, 508 U.S. 152, 162 n.3 (1993) (deferring the question of the deference to be accorded revenue rulings "to another day"); *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 518 n.9 (1992) ("Even if they were entitled to deference, neither of the [revenue] rulings . . . goes to the narrow question presented here.").

IRS revenue rulings are mere litigating positions and are not entitled to any deference. This is not merely the view of *amicus* TEI, whose members frequently find themselves at odds with the IRS. It is, more important, the view adopted by the United States Tax Court, a court uniquely qualified to assess the efficacy of IRS pronouncements. *United States v. Allen-Bradley Co.*, 352 U.S. 306, 311 (1957) (Harlan, J., concurring) (Tax Court holds "special expertise in tax matters"). According to the Tax Court, "a revenue ruling merely represents the Commissioner's position with respect to a specific factual situation." *Stark v. Commissioner*, 86 T.C. 243, 250-51 (1986). They are "merely the opinion of a lawyer in the agency and must be accepted as such" and are "not binding

[9] In *Davis*, the Court suggested that revenue rulings were entitled to "considerable weight" where they involve the contemporaneous construction of a statute, have been in long use, and have survived reenactment of the statute they construe. 495 U.S. at 484. The Court did not, however, cite *Chevron*, thereby intimating that a high level of deference is not warranted. Moreover, many revenue rulings do not meet the conditions set forth in *Davis*.

on the . . . courts." *Northern Indiana Public Service Co. v. Commissioner*, 105 T.C. 341, 350 (1995), *aff'd*, 115 F. 3d 506 (7th Cir. 1997) (citing *Stubbs, Overbeck & Associates, Inc.*, 445 F.2d at 1146-47). Hence, "a ruling or other interpretation by the Commissioner is only as persuasive as her reasoning and the precedents upon which she relies." *Halliburton Co. v. Commissioner*, 100 T.C. 216, 232 (1993), *aff'd without published opinion*, 25 F.3d 1043 (5th Cir. 1994). *See also DePaolis v. Commissioner*, 69 T.C. 283, 292 (1977) (Hall, J., dissenting) ("[t]o treat a ruling as more than the position of one of the litigants before us is to permit a man to be judge in *his* own cause—a principle abhorrent to law since the days of Hammurabi"). The Tax Court's position is consistent with this Court's holding in *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), that deference to "an agency's convenient litigating position" is "entirely inappropriate." *Id.* at 213. *Amicus* TEI submits that, given the similarity between IRS revenue rulings and Customs classification rulings, the Federal Circuit correctly held that neither should be accorded any deference.[10]

[10] In its brief on the merits, the United States relies heavily on *United States v. Correll*, 389 U.S. 299 (1967), for the proposition that the Federal Circuit erred in suggesting that deference may not be owed to revenue rulings. Brief for the Petitioner United States, *United States v. Mead Corp.* (No. 99-1434) at 16, 24-27, 31, 38. The government's citation of *Correll* is incorrect, disingenuous, and unpersuasive. That case involved the deference to be granted interpretative *regulations* that had been issued as a Treasury Decision (and subject to notice and comment), not a revenue ruling. *See Correll v. United States*, 369 F.2d 87, 89 n.2 (6th Cir. 1966). To be sure, the Court noted in passing that the IRS Commissioner's position in the case was first announced in a revenue ruling, 389 U.S. at 302 n.10, but the decision is inapposite to the question at issue here. *See* Rev. Proc. 89-14, *supra* n.3 (IRS admitting revenue rulings do not have same force of law as Treasury Decisions). Thus, the Federal Circuit's discussion of the deference owed to revenue rulings is consistent with this Court's decision in *Correll*. *See* note 12 *infra*, for a discussion of the deference to be accorded interpretative tax regulations.

V.

Alternatively, if the Court concludes that an intermediate level of deference should be accorded Customs rulings, the proper standard may be found in this Court's decision in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). In that case, the Court held:

> We consider that the rulings, interpretations and opinions of the Administrator under this [Fair Labor Standards] Act, *while not controlling upon the courts* by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.

Id. at 140 (emphasis added). Under *Skidmore*, the weight to be given the interpretation depends upon a variety of factors, including the ruling's thoroughness, the validity of its reasoning, its consistency with earlier and later interpretations, and "all those factors which give it power to persuade, if lacking power to control." *Id.*[11]

Thus, the Court has held that, although not entitled to deference, informal interpretations are entitled to some respect or weight on judicial review. *Martin v. Occupational Safety and Health Review Commission*, 499 U.S. 144, 157 (1991). "A reviewing court may certainly consult them to determine whether the Secretary has consistently applied the interpretation embodied in the citation, a factor bearing on the reasonableness of the Secretary's position." *Id.* Applying *Skidmore* here would place the burden of persuasion on the agency to convince a court that its interpretation of the statute is correct.

[11] Although *Skidmore* was decided 40 years before *Chevron*, its reasoning is not vitiated by the Court's decision. Only four months ago, this Court cited *Skidmore* in holding that Department of Labor opinion letters were not entitled to *Chevron*'s higher standard of deference. *Christensen*, 120 S. Ct. at 1663. *See also EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 256-57 (1991) (citing *Skidmore* in holding that interpretative guidelines are not entitled to *Chevron* deference).

It would also encourage agencies to issue clear regulations, while acknowledging that an agency may have superior insights into regulatory meaning. *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 687-88 (1996).

That a need exists for this Court to clarify the interaction of *Skidmore* and *Chevron* is demonstrated by the lower courts' confusion about the deference to be accorded agency interpretations such as Customs classification rulings and IRS revenue rulings. Some courts have held that revenue rulings are entitled to *Chevron* deference while others have limited the weight given to interpretative rulings.[12] This case provides an opportunity for the Court to clarify the standard. *Amicus* TEI respectfully submits that the courts according *Chevron* deference to such rules have inappropriately distended the doctrine, as most recently delineated in *Christensen*. *See* DAVIS & PIERCE § 3.5, at 119 (*Chevron* "should not be held to apply to agency pronouncements in less formal formats, *e.g.*, manuals, letters, guidelines, interpretative rules, or litigating positions."). "[D]eference is not abdication." *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 260 (1991) (Scalia, J., concurring). Similarly, "deference cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." *Elizabeth Blackwell Health Center for Women v.*

[12] *Compare Trans Union Corp. v. Federal Trade Commission*, 81 F.3d 228, 230 (D.C. Cir. 1996) ("[W]e have extended *Chevron* deference to agency interpretive rules"); *Elizabeth Blackwell Health Center for Women v. Knoll*, 61 F.3d 170, 182 (3d Cir. 1995) (equal deference); and *Garcia v. Secretary of Health and Human Services*, 46 F.3d 552, 557 (6th Cir. 1995) (same); *with Atchison, Topeka & Santa Fe Ry. v. Pena*, 44 F.3d 437, 441 (7th Cir. 1994) (en banc), *aff'd on other grounds*, 516 U.S. 152 (1996) (concluding that interpretative rules are "undeserving of substantial deference under *Chevron*"). *See generally* DAVIS & PIERCE § 3.5 (*Chevron* should not apply to informal pronouncements and interpretative rules).

Knoll, 61 F.3d 170, 185 (3d Cir. 1995), (Nygaard, J., dissenting) (citations and internal quotation marks omitted).

The Court's half-century old decision in *Skidmore* provides the guidepost that the lower courts need. Applying *Skidmore* to interpretative rules such as those involved here will provide needed guidance to the lower courts, while reserving *Chevron* deference, at most, to rules subject to the notice-and-comment process. It will avoid absurdities such as the Third Circuit's opinion in *Connecticut General Life Insurance Co. v. Commissioner*, 177 F.3d 136, *cert. denied*, 120 S. Ct. 469 (1999), where the court deferred to an IRS interpretation of a regulation that was advanced for the first time in litigation.[13] Such bootstrapping pronouncements are "particularly unreliable evidence of an agency's policy, given the powerful incentive for lawyers to take any position that is likely to further their clients' interest and the uneven level of supervision of work product of agency lawyers." DAVIS & PIERCE § 3.5, at 120.

Like the opinion letter in *Christensen*, agency interpretations contained in Customs classification and IRS revenue rulings may be "entitled to respect," but only to the extent that those interpretations have the "power to persuade." *Christensen*, 120 S. Ct. at 1663 (citation omitted). The Federal Circuit found the Customs classification ruling in this case unpersuasive. Its opinion should be affirmed.

[13] Even in *Connecticut General*, the regulation at issue was "legislative" (or substantive), rather than interpretative, and thus entitled to great deference. *See* BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 4.8, at 181-82 (3d ed. 1991). Even legislative regulations—those promulgated under a specific legislative grant of authority—must represent a reasonable interpretation of the statute. *Chevron*, 467 U.S. at 865. In contrast, interpretative regulations are entitled to less deference. *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 24 (1982) (quoting *Rowan Cos. v. United States*, 452 U.S. 247, 253 (1981)). They may have "particular force" if they are a substantially contemporaneous construction of the statute, longstanding, consistently applied, and scrutinized by Congress during subsequent re-enactments of the statute. *National Muffler Dealers Association v. United States*, 440 U.S. 472, 477 (1979). None of these conditions is satisfied here.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision below.

Respectfully submitted,

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No. 99-1434

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

MEAD CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF UNITED STATES ASSOCIATION OF IMPORTERS OF TEXTILES AND APPAREL, CHAMBER OF COMMERCE OF THE UNITED STATES, AND UNITED STATES APPAREL INDUSTRY COUNCIL AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the Court of International Trade is required to give controlling weight to a tariff classification ruling of the Customs Service under the standard enunciated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

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BRIEF OF UNITED STATES ASSOCIATION OF IMPORTERS OF TEXTILES AND APPAREL, CHAMBER OF COMMERCE OF THE UNITED STATES, AND UNITED STATES APPAREL INDUSTRY COUNCIL AS AMICI CURIAE IN SUPPORT OF RESPONDENT

This brief is filed on behalf of the United States Association of Importers of Textiles and Apparel, the Chamber of Commerce of the United States, and the United States Apparel Industry Council, as *amici curiae* in support of respondent, with the written consent of the parties.[1]

[1] No counsel for a party to this case authored this brief in whole or in part, and no person or entity than *amici curiae* or their members made a monetary contribution to the preparation and submission of this brief.

INTEREST OF AMICI

Amici curiae are trade or business organizations, each with members who annually import millions of dollars worth of goods into the United States and who thus receive numerous classification rulings from the Customs Service each year. As representatives of these members, *amici* have a substantial interest in the standard of judicial deference applicable to those rulings in challenges in the Court of International Trade.

The United States Association of Importers of Textiles and Apparel ("USA-ITA") is a trade association with more than two hundred members involved in the textile and apparel business. USA-ITA's members include manufacturers, distributors, retailers, and related service providers, such as shipping lines and customs brokers.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. The Chamber represents an underlying membership of more than three million businesses and organizations, with 140,000 direct members, in every size, sector and geographic region of the country. The Chamber serves as the principal voice of the business community. An important function of the Chamber is to represent the interests of its members by filing *amicus* briefs in this Court on issues of national concern to American business.

The United States Apparel Industry Council ("USAIC") is a national association which represents the interests of U.S.–based multinational apparel and textile firms. Its twenty-five member companies are deeply involved in the export and import of the entire range of textile and apparel products.

INTRODUCTION AND SUMMARY OF ARGUMENT

This is a case of statutory interpretation. In issue is the level of deference, if any, the Court of International Trade ("CIT") is required to give to a "classification ruling" by the Customs Service specifying the appropriate classification for tariff purposes of a particular good to be imported. The United States contends that such rulings are to be given controlling weight in every case unless they are manifestly contrary to the tariff statute. That contention is wrong.

The United States errs because it treats resolution of this issue as governed solely by abstract principles of administrative law, including general principles of deference to administrative agency action. Resort to such default rules is inappropriate here because Congress has prescribed, by statute, the specific regime of judicial deference that applies in civil actions in the CIT challenging Customs Service classification rulings. Under that regime, the CIT is to review *de novo* the question whether the Service made an appropriate classification determination, which means that the court cannot give controlling weight to that determination. Instead, the court must reach its own independent legal determination as to the merits of the classification decision.

In *United States v. Haggar Apparel Co.*, 119 S. Ct. 1392 (1999), this Court acknowledged the CIT's *de novo* review authority, but held that such authority was not inconsistent with deference to an interpretive regulation issued by the Service. Such regulations, the Court explained, serve only to define the underlying law that governs review of individual classification ruling, and the CIT can still review the classification decision itself *de novo*, *viz.*, by applying the facts to the underlying law (which includes the interpretive regulation to which it must defer). *Id.* at 1399.

This case is fundamentally different from *Haggar Apparel*. At issue here is the question of deference not to a

regulation establishing the law generally governing individual classification rulings, but to the *application* of that law to the facts of an individual case. That difference is dispositive. It is a logical impossibility for the CIT both to defer to a classification ruling and to review it *de novo* at the same time. Deference to the Service's classification rulings is, in other words, foreclosed by the same statutory structure cited in *Haggar Apparel* to justify deference to the Service's regulations. And that structure is the product of a long history of congressional refusal to confer discretion in respect to tariff classification rulings on the federal customs collector over the federal courts.

Nevertheless, to the extent individual classification rulings reflect long-held views of the Service, or are the result of carefully-reasoned judgment, the CIT may treat them as persuasive authority as to the correct classification. *See Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Such a rule is not inconsistent with *de novo* review because the court does not give rulings controlling weight; instead the court simply accords them due respect in the process of reaching its own independent legal judgment as to their correctness. Deference in these terms is not generally applicable to all rulings, but rather depends on the nature of the particular ruling in issue. Because the ruling at issue here does not appear to satisfy the usual prerequisites for the respect due under *Skidmore*, the Federal Circuit did not err in giving the ruling no deference at all.

ARGUMENT

I. THE STATUTE GOVERNING REVIEW OF CUSTOMS SERVICE CLASSIFICATION RULINGS MAKES CLEAR THAT SUCH RULINGS ARE ENTITLED ONLY TO RESPECT AS PERSUASIVE AUTHORITY

A

It is common ground here that the question of how much a court should defer to the judgment of an administrative agency on a matter of statutory interpretation is ultimately one of congressional intent. *See* Brief for the United States ("U.S. Br.") at 27 n.13. In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this Court explained that where there is ambiguity in a statute administered by a federal agency, courts are to presume that the congressional intent was to delegate to that agency the discretion to interpret the statute in whatever reasonable manner the agency considered appropriate. *Id.* at 843. In such cases, because Congress has effectively delegated interstitial lawmaking authority to the agency, courts must give the agency's interpretation of the statute "controlling weight" so long as it is not an unreasonable resolution of the statutory ambiguity. *Id.* at 844. As the Court put it in *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996):

> We accord deference to agencies under *Chevron* . . . because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.

Id. at 740-41.

The presumption that Congress intends to vest interpretive responsibility in the agency, "rather than the courts," *id.*, is only that – a presumption. It is not irrebuttable. Even where a statutory ambiguity exists, the agency interpretation is not controlling in a subsequent judicial action if Congress has made clear its intention *not* to displace the usual authority of courts to interpret and apply the law. *See United States v. Haggar Apparel*, 119 S. Ct. 1392, 1399 (1999) (*Chevron*-type deference does not apply when Congress has "chosen to direct the court not to pay deference to the agency's views"); *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) ("[E]ven if AWPA's language establishing a private right of action is ambiguous, we need not defer to the Secretary of Labor's view of the scope of § 1854 because Congress has expressly established the judiciary and not the Department of Labor as the adjudicator of private rights of action under the statute."). *Chevron*-type deference does not apply, in other words, when Congress has "specified that in all suits involving interpretation or application of [a statute] the courts [a]re to give no deference to the agency's views, but [a]re to determine the issue de novo." Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 515-16.[2]

[2] Put another way, *Chevron*-type deference does not apply to agency rulings that "lack the force of law." *Christensen v. Harris County*, 120 S. Ct. 1655, 1662 (2000); *see, e.g., Reno v. Koray*, 515 U.S. 50, 61 (1995); *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 256-58 (1991); *Martin v. OSHRC*, 499 U.S. 144, 157 (1991). The conclusion follows because if the agency ruling does not carry the force of law, then the court necessarily remains the only arbiter of the law, and there is no basis for *Chevron* deference. As elaborated below, however, even when the agency ruling *does* carry the force of law, it does not necessarily follow that the court is wholly divested of independent interpretive authority. The *extent* to which a court retains interpretive authority, just as much as the question whether it retains interpretive authority at all, is a question of congressional intent.

B

There is also no dispute here that under the statute governing the procedures for challenging a classification ruling in the CIT, the court is required to determine the issue *de novo*. Because Congress thereby "has expressly established the judiciary and not the [Customs Service] as the adjudicator of [classification rulings] under the statute," *Adams Fruit*, 494 U.S. at 649, *Chevron*-type deference to the Service's classification rulings is improper.

1. In briefing before this Court in *United States v. Haggar Apparel*, the most recent case addressing the degree of deference owed to a Customs Service decision, the United States explicitly conceded that challenges to classification rulings in the CIT involve trials *de novo*. *See* U.S. Reply Br., No. 97-2044, at 3, 4. The United States has not addressed the question here, but its earlier concession follows as a matter of course from the statutory text and structure.

Section 2640 of U.S. Code Title 28 sets forth the "Scope and standard of review" applicable in classification ruling challenges before the CIT. The statute prescribes that in all "[c]ivil actions contesting the denial of a protest [to a classification ruling]," the CIT "shall makes its determination upon the basis of *the record made before the court*," 28 U.S.C. § 2640(a)(1) (emphasis added) – not the record made before the Customs Service, as in other kinds of CIT proceedings, *see, e.g., id.* § 2640(d), (e). The statute also specifically allows an importer in a classification ruling case to raise before the CIT "any new ground" for challenging the ruling, even grounds not previously urged by the importer or considered by the Customs Service. 28 U.S.C. § 2638. If there is any doubt at all that these statutory provisions on

their face evidence Congress's intent to vest the CIT with the power of *de novo* review over Customs Service classification rulings, the legislative history unambiguously confirms that intent. *See* S. Rep. No. 96-466, at 18-19 (1979) ("[p]roposed section 2640(a)(1) provides for a trial de novo" in classification ruling suits); H.R. Rep. No. 96-1235, at 44 (1980) ("the bill preserves the right to a trial de novo for the review of a denial of a protest").

2. The fact that CIT review of classification rulings is *de novo* conclusively refutes any possibility that the CIT's review is bound by *Chevron*-type deference. By definition, *de novo* review of a legal issue such as a classification ruling is not deferential review of that issue. When Congress requires the court to apply a *de novo* standard in reviewing an individual agency action, it means that Congress intends for the court – and not the agency – to possess ultimate discretionary authority to apply the statute in the particular circumstance. *See, e.g., United States v. First City Nat'l Bank*, 386 U.S. 361, 368-69 (1967) (phrase in Bank Merger Act requiring court to "review *de novo* the issues presented" means "that the court should make an independent determination of the issues," and that it is "the court's judgment, not the [agency's], that finally determines whether the merger is legal"). As then-Judge Ginsburg put it for the en banc D.C. Circuit:

> *De novo* means here, as it ordinarily does, a fresh, independent determination of 'the matter' at stake; the court's inquiry is not limited to or constricted by the administrative record, nor is any deference due the agency's conclusion . . . . Essentially, then, the district court's charge was to put itself in the agency's place.

Doe v. United States, 821 F.2d 694, 697-98 (D.C. Cir. 1987) (en banc); *see also Aronson v. IRS*, 973 F.2d 962, 965-67 (1st Cir. 1992) (Breyer, C.J.) (contrasting *de novo* review with *Chevron* deference).

The "matter at stake" in a proceeding challenging a Customs classification ruling is, of course, the proper classification of the good in question. Under the regime established by Congress, the Customs Service makes an *initial* determination in respect to the classification of the good, which is a "binding ruling" under the statute. 19 U.S.C. § 1502(a). It is only "binding," however, to the extent it is not reviewed and rejected by the CIT. If the ruling is challenged by the importer whom the ruling binds, the CIT's power of *de novo* review necessarily means that CIT must reach its own independent determination of the proper classification. As the United States itself conceded in *Haggar Apparel*, because "proceedings in the [CIT] on customs protests" are *de novo* proceedings, they are "unlike judicial review of the actions of other agencies in that any 'record' made in the Service, including the reasons for its assessment, is irrelevant." U.S. Reply Br., No. 97-2044, at 3 n.2 (internal quotation marks omitted). Inasmuch as the record and reasons for the Customs classification ruling are by statute "irrelevant" in a subsequent CIT challenge, the CIT cannot possibly defer to that ruling.

The United States seeks to avoid the force of its *Haggar Apparel* concession by focusing on an irrelevancy. The United States argues that the deference is required simply because the Service's initial ruling has the "binding" force of law, *see* U.S. Br. at 30, which, says the United States, automatically entitles the ruling to controlling weight under usual administrative law deference principles. Classification rulings may or may not have the force of law, *cf.* Pet. App. at 6a (decision below, holding that they do not); Brief Amicus Curiae of Professor Thomas Merrill at 26-30 (same), but that question is beside the point.

As just discussed, the investiture of authority in the agency to issue a legally binding decision does not necessarily mean that Congress intended to deprive a reviewing court of *its* authority to interpret and apply the law.[3] The question is not simply whether Congress intended to give the agency the authority to reach an initial "binding" legal conclusion. The question is, rather, whether Congress intended to "specifically designate[]" the agency as "the primary source for interpretation and application of the . . . law." *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 (1980). *Chevron* deference is ordinarily justified, in other words, because of the presumption that the delegation of lawmaking authority to the agency reveals "a decided preference for resolving interpretive issues by uniform administrative decision, rather than piecemeal through litigation." *Id.* at 568. But, as we have seen, that preference is *only presumed*; it does not apply where the statute reveals that Congress in fact intended to preserve the authority of courts to reach independent legal conclusions. *See supra* at 6.

Here, it is evident from the statutory structure that Congress's "decided preference" for the final resolution of tariff classification issues was not by "uniform administrative decision" but by uniform *judicial* decision: Congress created a single Court of International Trade, with the exclusive authority to review individual tariff classification rulings *de novo* and reach an independent judgment as to the proper

[3] For the same reason, the government's rather inscrutable assertion that *Chevron* deference applies here simply because the rulings were "issued in the format that Congress authorized for this specific purpose," U.S. Br. at 31, is also incorrect. Regardless of the "format" Congress envisioned for the issuance of interpretive rulings, the dispositive fact is that the statute explicitly grants the CIT the authority to reach its own judgment on classification determinations.

classification.[4] Accordingly, the presumption that underlies and justifies *Chevron* deference is inapplicable.

3. This Court's decision in *Haggar Apparel* confirms all of this by necessary implication. The Court held in that case that, despite the existence of the *de novo* review requirement in judicial challenges to classification rulings, the CIT is nevertheless bound to give *Chevron*-type deference to an interpretive *regulation* issued by the Customs Service establishing some of the ground rules for classification determinations. While the Court in *Haggar Apparel* found no inconsistency between the deference to the Customs Service's interpretation of the underlying law and the CIT's broad power of *de novo* review, that view was predicated on the assumption that the CIT *would* have power to review *de novo* the application of the facts to the underlying law.

In rejecting the claim that *de novo* review necessarily entailed the authority to make an independent determination as to *all* questions of law, the Court explained that "[*d*]*e novo* proceedings presume a foundation of law." *Haggar Apparel*, 119 S. Ct. at 1399. Because regulations issued by an agency simply "establish legal norms," it follows that "[d]eference can be given to the regulations without impairing the author-

[4] The United States argues for *Chevron*-type deference here on the instructive rationale that such deference "preserves uniformity in federal law by providing for national determinations made by the administering agency rather than potentially splintering effect of regional determinations made by lower federal courts." U.S. Br. at 26 n.11 (internal quotation marks omitted). The United States is of course correct that such a rationale explains *Chevron*-type deference generally, but the government's own argument proves why such deference is improper and unnecessary here: there can be no "splintering effect" on classification issues because there are no "regional determinations of lower federal courts"; there are *only* "national determinations" made by the one court with reviewing authority, the CIT.

ity of the court to make factual determinations, and to apply those determinations to the law, *de novo*." *Id.*

By contrast, it is not possible to give deference to a classification ruling "without impairing the authority of the court . . . to apply [factual determinations] to the law, *de novo*." A classification ruling is nothing but an application of facts – i.e., a description of the good – to the law – i.e., the statute and regulations defining the tariff classifications. What results is a legal conclusion regarding the proper tariff classification for the good, and the statute explicitly confers on the CIT the power to review the Customs Service's conclusion on that issue *de novo*. *See supra* at 7-8.[5] It strains logic beyond the snapping point to say that the CIT is required to give "controlling" weight to the very legal conclusion it is supposed to be reviewing *de novo*.[6] The CIT simply cannot

[5] When the Court in *Haggar Apparel* noted that it found no "directive" in the statute "not to pay deference to the agency's views," 119 S. Ct. at 1399, the Court was referring to the fact that there was no directive not to pay deference to interpretive regulations. The *de novo* requirement was not tantamount to such a directive, the Court explained, because the CIT could still apply *de novo* review while deferring to the interpretation in the agency's regulation. *Id.* By contrast, as we explain in the text, it cannot both review a classification ruling *de novo* and defer to that ruling at the same time.

[6] It would be no answer to suggest that *de novo* review in this context must be limited only to factfinding. First, that limitation would be inconsistent with the importer's right to bring up new issues on review. *See supra* at 7. Second, so far as we can tell, such a constricted application of *de novo* review would be unique in the law. *See supra* at 8-9. Third, this Court itself in *Haggar Apparel* did not comprehend such a circumscribed meaning. *See* 119 S. Ct. at 1399 (noting that *de novo* review includes application of facts to law). Fourth, and finally, it is the experience of *amici*'s members that classification matters almost never involve disputed

apply *de novo* review to a classification ruling at the same time that it gives deference to that selfsame ruling. It follows that the result in this case in respect to such deference must be different from the result in *Haggar Apparel*.

By reserving to the CIT the power of *de novo* review, it is fair to say that Congress evidenced its intention to confer on that court somewhat more authority than is usual to review (and second-guess) administrative-type determinations such as tariff classification rulings. *See* U.S. Reply Br., *United States v. Haggar Apparel, Inc.*, No. 97-2044, at 3 n.2 (judicial review of customs protests "are unlike judicial review of the action of other agencies" (internal quotation marks omitted)). But it not absurd that Congress would do so, nor is it even especially strange. As noted above, the usual concerns about piecemeal litigation over certain matters of legal application are not present; uniformity is ensured because a single court of review exists for all classification determinations. *See supra* at 10-11 & note 4. And as elaborated below in Part II, the unique history of customs determinations well explains why in fact Congress saw fit to depart from the administrative law norm in structuring the relationship between the Customs Service and the judiciary. What matters most of all, however, is that Congress did de-

factual issues; the vast majority are decided on the basis of an undisputed factual record (*e.g.*, a sample or description of the precise good in question) and cross-motions for summary judgment on the correct legal classification. *See, e.g., Avenues in Leather, Inc. v. United States*, 178 F.3d 1241 (Fed. Cir. 1999); *Trans-Border Customs Service, Inc. v. United States*, 76 F.3d 354 (Fed. Cir. 1996). If such classification rulings are entitled to controlling weight, in almost every classification challenge there will be nothing for the CIT to review *de novo* at all. It is hard to imagine why Congress would have gone out of its way to establish by statute a special category of plenary agency review that is almost never to be invoked.

part from that norm, explicitly investing in the CIT (rather than the Customs Service) final, legal discretion in respect to classification rulings. In view of the allocation of that discretion, *Chevron*-type deference is inappropriate.

C

1. The fact that the CIT retains the power to review a given classification ruling *de novo*, and thus that the court need not accord the ruling *Chevron*-type deference, does not mean that the CIT should give the views of the Customs Service no respect at all. Indeed, the CIT's governing statute establishes a "presumption of correctness" in favor of the Service's ruling. 28 U.S.C. § 2639(a)(1). In point of fact, however, that provision means only that the burden is on the importer to establish that the Service's ruling is incorrect. *See Jarvis Clark Co. v. United States*, 733 F.2d 873, 876-78 (Fed. Cir. 1984). As to whether the importer carried that burden, the court retains the plenary review authority conferred by the statute.

Of greater significance than § 2639(a)(1) is the decision of this Court in *Christensen v. Harris County*, 120 S. Ct. 1655 (2000), issued after the decision of the Federal Circuit in this case. In *Christensen*, a majority of this Court confirmed that even where *Chevron* deference to an agency's legal interpretation is inappropriate because the agency action in issue "lack[s] the force of law," 120 S. Ct. at 1662 – thus leaving discretionary legal authority over the matter in the hands of the court and not the agency, *see supra* note 2 – the agency's interpretation may still be "'entitled to respect'" purely for its persuasive authority. *Id.* at 1663 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)). Under the "*Skidmore* deference" acknowledged by eight Justices in *Christensen*, the views of a specialized agency "may possess the 'power to persuade,' even where they lack the 'power to control.'" *Id.* at 1667 (Breyer, J., dissenting); *see id.* at 1668 (agreeing

with majority that *Skidmore* deference "retains legal vitality" in circumstances in which *Chevron* may be inapplicable); *id.* at 1667 n.2 (Stevens, J., dissenting) ("I fully agree with agree with Justice Breyer's comments on *Chevron*"). Thus, depending on such factors as the quality of its reasoning and the length of the Service's adherence to it in other like cases – both relevant factors under *Skidmore*-type deference, *see* 323 U.S. at 140 – a given classification ruling may be "entitled to respect" from the CIT as persuasive authority on how a given set of facts ought to be applied to the law.

2. It is important to make clear that the kind of respect for agency interpretations contemplated by what is called "*Skidmore* deference" is in no way inconsistent with the authority of the CIT to engage in *de novo* review of classification rulings. Put differently, *Skidmore* "deference" does not divest the court of its responsibility to reach its own independent judgment as to the proper classification.

This Court's opinion in *Salve Regina College v. Russell*, 499 U.S. 225 (1991), is instructive. The Court held in that case that a federal court of appeals is required by the principles of *Erie RR v. Tompkins* to apply *de novo* review to the state-law determinations of a federal district court sitting in diversity, even though a district court might have greater familiarity or experience with the law of the state in which it sits. *Id.* at 231-39. In so holding, however, the Court was careful to point out that a well-reasoned district court decision naturally would still be of significant value to the reviewing court:

> Independent appellate review necessarily entails a careful consideration of the district court's legal analysis, and an efficient and sensitive appellate court at least will actually consider this analysis in undertaking its review. . . . Any expertise possessed by the district court will inform the structure and

> content of its conclusions of law and thereby become evident to the reviewing court. If the court of appeals finds that the district court's analytical sophistication and research have exhausted the state-law inquiry, little more need be said in the appellate opinion.

Id. at 232-33.

Those principles capture perfectly the application of *Skidmore*-type deference as it applies to the CIT's review of Customs Service classification rulings. While the CIT's *de novo* review authority requires the court to reach its own independent conclusion as to a particular classification, the court still may give respect to the presumably greater experience of the Customs Service in making classification decisions. To the extent that experience is reflected in well-reasoned legal classification rulings or rulings that withstand the force of time, *Skidmore*-type deference simply means the CIT can and should give due respect to the persuasive force of those rulings.

3. For those reasons, the government's heavy reliance on *Zenith Radio Corp. v. United States*, 437 U.S. 443 (1978), is misplaced. In *Zenith Radio*, this Court, applying a form of *Skidmore* deference, elected to defer to a Customs Service ruling in a countervailing duty case that applied an interpretive position adopted in 1898 and "uniformly maintained" by the agency ever since. *Id.* at 450. "This longstanding and consistent interpretation," the Court explained, "is entitled to considerable weight." *Id.*

Contrary to the United States' suggestion, *Zenith Radio* does not stand for the proposition that *all* Customs classification rulings are entitled to the kind of near-conclusive deference given under *Chevron*. *Zenith Radio* was obviously decided *before Chevron*, which was a "watershed" decision, *Christensen*, 120 S. Ct. at 1664 (Scalia, J., concurring), one

that at a minimum established an entirely new kind of judicial deference to agency legal interpretations, *id.* at 1664; *id.* at 1662-63 (maj. op.) (also distinguishing between *Chevron* and *Skidmore* deference). While the government nevertheless insists that *Zenith Radio* was a "direct precursor" to *Chevron*, if *Zenith Radio* were in fact a "pre-*Chevron*" *Chevron*-type case and not a *Skidmore*-type case, the Court would not have found it necessary to expound upon the interpretation's impressive pedigree. The existence of *Chevron* deference *vel non* turns exclusively on whether or not the statute evidences a congressional intent to delegate to the agency exclusive power to issue binding interpretations of law; if so, the court must defer to a reasonable interpretation; if not, *Chevron*-type deference is unwarranted. *See Christensen*, 120 S. Ct. at 1662. The venerability and consistency of an agency interpretation, while fundamental to *Zenith Radio*, have no place in a *Chevron* analysis – they are considerations unique to the *Skidmore* form of deference.

Thus, *Zenith Radio* at the very most represents a case in which this Court gave substantial deference to a ruling that reflected interpretations held by the Service consistently over a period of many decades. That is just what *Skidmore* requires. *Zenith Radio* necessarily says nothing about how much the CIT ought to defer to rulings that are not so deeply rooted, or lack the quality of reasoning to be expected in a deliberative judgment.

4. As *amici*, we have no view as to the correctness of the particular classification ruling at issue in this case, when examined on its own terms. The point here is that the Federal Circuit was at least correct to examine the ruling on its own terms. The ruling does not appear to be entitled to *Skidmore/Zenith Radio* "respect" as a long-held and consistent agency interpretation, *see* Resp. Br. In Opp. To Cert. at 3 (describing recent issuance of ruling and changes in interpretation), and it is perfectly clear that the ruling is not enti-

tled to *Chevron*-style deference, *see supra* at 8-14. The Federal Circuit thus did not err in according no deference at all to the classification ruling in this case.

II. THE MODERN STATUTORY STRUCTURE OF NONDEFERENTIAL JUDICIAL REVIEW IS CONSISTENT WITH THE HISTORIC ROLE OF THE JUDICIARY IN THE RESOLUTION OF TARIFF CLASSIFICATION DISPUTES

The previous section established that the plain text and structure of the modern statutes governing the adjudication of customs classification disputes evidences Congress's intent to vest courts with broader authority than is normally "presumed" by canons of construction like *Chevron*. In this section we explain why the CIT's authority is relatively unique: the modern structure affording CIT *de novo* review of classification rulings – and thus denying the Customs Service deference to those rulings – is an outgrowth of a long history of congressional refusal to subject importers to the discretion of the customs collector in making tariff classification decisions.

A

From the first days of the Republic importers enjoyed the right to challenge the classification of goods by a customs official by instituting a civil jury trial in which all questions of fact and law were adjudged *de novo*. The second statute that Congress passed, the Act of July 4, 1789, ch. 2, 1 Stat. 24, set forth a tariff schedule and imposed duties on imported goods. The customs official collected duties, which were required to be paid; if the importer objected to an assessment, his recourse was a common law right of action against the collector personally "to recover back an excess of duties paid to him as collector" in light of an erroneous classification. *Elliot v. Swartwout*, 35 U.S. (10 Pet.) 137, 158 (1836).

This exposure to personal liability led most collectors to hoard, and some to embezzle, contested duties. Congress responded by a 1839 statute requiring that collectors pay disputed sums to the United States Treasury, and requiring the Secretary of the Treasury to refund any duties later found to have been erroneously collected. Act of March 3, 1839, ch. 82, § 2, 5 Stat. 339, 348-49. In *Cary v. Curtis*, 44 U.S. (3 How.) 236, 239-52 (1845), this Court held that the 1839 statute eliminated the common law right of action against the collector, and that the power to resolve customs disputes rested exclusively with the Secretary of the Treasury.

In dissent, Justice Story argued that the Court's construction of the Act eliminated the importer's right to *de novo* judicial review of tariff classification decisions that traditionally had been critical to the resolution of classification controversies:

> [G]rave controversies must always exist (as they have always hitherto existed) as to the category within which particular fabrics and articles are to be classed. The line of discrimination between fabrics and articles approaching near to each other in quality, or component materials, or commercial denominations, is often very nice and difficult, and sometimes exceedingly obscure. It is the very case, therefore, which is fit for judicial inquiry and decision. . . .
>
> Besides, we all know that, in all revenue cases, it is the constant practice of the secretary of the Treasury to give written instructions to the various collectors of the customs as to what duties are to be collected under particular revenue laws, and what, in his judgment, is the proper interpretation of those laws. . . . Of what use then, practically speaking, is the appeal to him, since he has already given his decision? Further, it is well known, and the annals of

> this court as well as those of the other courts of the United States establish in the fullest manner, that the interpretations so given by the secretary of the Treasury have, in many instances, differed widely from those of the courts. The Constitution looks to the courts as the final interpreters of the laws.

44 U.S. (3 How.) at 256-57 (Story, J., dissenting).

Just over a month after *Cary* was decided, Congress enacted the Act of February 26, 1845, ch. 22, 5 Stat. 727, effectively overruling *Cary* and restoring *de novo* judicial review by establishing a statutory right to a trial by jury against the collector. *See* Brown, *The United States Customs Court I*, 19 ABA J. 333, 336 (June 1933). Not long thereafter, this Court confirmed that the statute had restored the supremacy of the judicial role vis-à-vis Customs rulings:

> The orders as well as the opinions of the head of the Treasury Department, expressed in either letters or circulars, are entitled to much respect, and will always be duly weighed by this court, but it is the laws which are to govern, rather then their opinion of them, and importers, in cases of doubt, are entitled to have their rights settled by the judicial exposition of those laws, rather than by the views of the Department. And though, as between the customhouse officers and the Department, the latter must by law control the course of proceeding, yet, as between them and the importer, it is well settled, that the legality of all their doings may be revised in judicial tribunals.

Greely v. Thompson, 51 U.S. 225, 234 (1850) (citations omitted).

B

By the 1880s, the volume and complexity of customs litigation had overwhelmed the ability of the courts to handle the caseload efficiently and effectively, and lack of uniformity in decisions was of serious concern. Congress responded by creating specialized trial and appellate courts specifically to handle Customs cases. *See generally United States v. Stone & Downer Co.*, 274 U.S. 225, 232-34 (1927).

The first new entity was a special Board of General Appraisers created to hear appeals from decisions of customs officials, with an appeal to federal circuit courts. Act of June 10, 1890, Ch. 407, 26 Stat. 131. In response to strong objections concerning the abolition of the right to a jury trial, the Act expressly provided for "a review of the questions of law and fact" by the federal court, and further permitted the introduction of new evidence before the reviewing court. *Id.* § 15. Construing that statute, this Court held that "a party dissatisfied with the classification of imports may apply to the court to have examined and reviewed everything involving the legality of the [collector's] demand." *Erhardt v. Schroeder*, 155 U.S. 124, 129 (1894); *see also Merritt v. Walsh*, 104 U.S. 694, 700 (1891) ("Discretion in the customs-house officer should be limited as strictly as possible.").

The next entity was a specialized appellate court, the Court of Customs Appeals, with exclusive jurisdiction to hear appeals from the Board. Act of August 5, 1909, ch. 6, § 29, 36 Stat. 11, 105-6. In 1926 Congress renamed the Board the United States Customs Court. Act of May 28, 1926, ch. 411, 44 Stat. 669, 669. The Customs Court reviewed all classification cases *de novo*. *See, e.g.*, Tariff Act of 1922, § 514, ch. 356, 42 Stat. 858, 969 (importer may challenge "[a]ll decisions of the collector, including the legality of all orders and findings entering into the same"); *C.J. Tower & Sons v. United States*, 33 Cust. Ct. 14, 15 (Cust. Ct. 1954)

("[t]he courts are not influenced by the interpretative rulings made for the guidance of customs officers" in "the construction of the tariff laws"). Congress later conferred Article III status on both courts. *See Glidden Co. v. Zdanok*, 370 U.S. 530 (1962).

In 1970, with the United States Customs Court again facing a "rapidly expanding workload," S. Rep. No. 91-576, at 7 (1969), Congress enacted the Customs Courts Act of 1970, Pub. L. No. 91-271, 84 Stat. 274. Among other things, this Act continued to give the Customs Courts exclusive jurisdiction over "the legality of all orders and findings entering into" a classification dispute, 28 U.S.C. § 1582(a) (1970), and permitted the Customs Court to consider "any new ground" in a civil action challenging a tariff classification. *Id.* § 2632(d); *see* S. Rep. No. 91-576, at 18 (1969).

C

Building on the unbroken tradition of *de novo* judicial review of tariff classification decisions dating back to the beginning of the Republic, Congress established the current regime for the adjudication of classification disputes in the Customs Court Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727. That act instituted "a comprehensive system of judicial review of civil actions arising from import transactions" that "clarified and expanded [the] jurisdiction" of the Customs Court, H.R. Rep. No. 96-1235, at 20 (1980), and changed its name to the Court of International Trade, Pub. L. No. 96-417 § 192(a), 94 Stat. at 1729. In hearings on the Customs Courts Act, the Department of Justice – the principal drafter and supporter of the bill – explained that under the prior law "civil action challenges" to "a decision by the Customs Service" were tested "in a trial de novo," and added that "[w]e strongly believe that this current method of obtaining judicial review ought to be maintained." Hearing on S. 1654 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 96th Cong. 15 (1979) (statement of David M. Cohen, Director, Commercial Litigation Branch, Department of Justice). The Department further declared that "trial de novo is the most sweeping form of judicial review available" and that it was not the Department's intent in drafting the bill "to change that principle at all." Hearing on S. 2857 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 95th Cong. 62 (1978) (statement of David M. Cohen, Chief, Customs Section, Department of Justice).

* * * *

The history reported here reveals the unusual depth and consistency of Congress's commitment to ensuring that primary discretionary authority over tariff classification decisions remains in the hands of the judiciary and not the with customs collector.[7] The standard of highly deferential review of tariff classification rulings by the Customs Service urged by the United States in this case not only contradicts, but offends, that commitment. In view of the congressional design evidenced in the statutory structure adopted in the Customs Court Act of 1980, and the tradition on which that Act was founded, this Court should hold that Customs Service tariff classification rulings are not entitled to deference in any respect other than as persuasive authority.

---

[7] The Court's conclusion in *Haggar Apparel* that this history is not relevant to the question of deference to a Customs *regulation*, *see* 119 S. Ct. at 1400, does not deny its relevance to the question of deference a Customs *ruling*, which has been Congress's central concern from the outset. *See also supra* at 11-13 & note 5.

CONCLUSION

For the foregoing reasons, this Court should hold that the CIT is not required to accord Customs classification rulings controlling weight under the standard enunciated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Respectfully submitted,

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UNITED STATES OF AMERICA,
Petitioner,

v.

THE MEAD CORPORATION,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

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BRIEF *AMICUS CURIAE* OF THE AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether classification rulings issued by the Customs Service are entitled to deference in determining the proper tariff classification of imported goods.

2. Whether the Customs Service reasonably interpreted the statutory phrase "diaries, notebooks and address books, bound" in Subheading 4820.10.20 of the Harmonized Tariff Schedules of the United States to include the spiral-bound and ring-bound planners imported by Respondent.

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INTEREST OF *AMICUS CURIAE*

The American Association of Exporters and Importers ("AAEI") is a national association of over 1,000 U.S. firms that are involved in importing products into, and exporting products from, the United States.[1] AAEI's member companies export, import, distribute and manufacture a broad spectrum of products, including chemicals, electronics, machinery, footwear, automobiles and parts, food, household consumer goods, toys, specialty items, textiles and apparel. In addition, many organizations serving the international trade community—customs brokers, freight forwarders, banks, attorneys, insurance firms and carriers—are active members of AAEI.

Since its founding in 1921, AAEI has played a strategic role in monitoring and reviewing U.S. Customs regulations and compliance initiatives, such as account management, self-governance, compliance assessment reviews, outbound enforcement, duty drawback, and reconciliation. AAEI is often called upon by Congressional committees to offer its technical expertise on policy and regulatory matters causing impact on global commerce. AAEI has participated as an *amicus curiae* in a number of cases involving issues of interest to its members in this Court, the U.S. Court of Appeals

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1 Pursuant to Supreme Court Rule 37.6, *amicus curiae* affirms that no counsel for either party authored any part of this brief and that no one other than *amicus curiae* provided any financial support for the preparation of this brief.

Pursuant to Supreme Court Rule 37.2, written consent to the filing of this brief has been obtained from counsel for petitioners and respondents, and the documents reflecting consent have been filed with the Clerk's office.

for the Federal Circuit, and the U.S. Court of International Trade.[2]

AAEI and its member companies are interested in the proper administration of the customs laws and in preserving meaningful judicial review of customs decisions. This case is significant for AAEI because it raises the question of the degree of deference accorded the decisions of the Customs Service, an issue of central importance to those who interact with Customs.

As the only national association specifically representing U.S. corporations involved in both importing and exporting, AAEI is well-suited to articulate the interests of the trade community in this case, and to provide the Court with a broad perspective on customs law and the consequences of giving deference to Customs Service decisions.

STATEMENT OF THE CASE

This case arises in an unique legal context, steeped in over two centuries of legal tradition: the classification of goods by the United States Customs Service. The issue in this case—the scope of deference due the case-specific, fact-specific decisions of the Customs Service classifying particular goods imported into the United States—may potentially be of broad significance to other administrative agencies. But to understand this case, it is necessary to begin with an understanding of the nature of customs law, the types of decisions made by the Customs Service, and the specialized nature of judicial review in this context.

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[2] *See, e.g., Vimar Seguros y Reaseguros, S. A. v. M/V Sky Reefer*, 515 U.S. 528, 530 (1995); *Matsushita Electric Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 576 (1986).

A. The Customs Service

Established in 1789 by the fifth act of the First Congress, which was signed into law by President George Washington, the Customs Service is one of the oldest federal agencies, predating by some 150 years the rise of the modern administrative state.[3]

Although the Customs Service has come to perform a number of other duties relating to import and export transactions, its primary mission has always been to collect taxes on goods imported into the United States. Indeed, Customs proudly reminds us that for nearly the first 125 years of the Nation's existence, customs revenues funded virtually the entire federal government.[4] Consistent with its tax-collecting function, the Customs Service defines its mission as "*Protect the Revenue.*"[5]

B. Judicial Review By Specialized Courts

Judicial review of Customs decisions also dates to the earliest days of the Republic. Although the Nation's first

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[3] *See* Act of July 31, 1789, ch.5, 1 Stat. 29 (establishing ports of entry and the office of customs collector).

[4] *See U.S. Customs History* <http://www.customs.gov/about/about.htm> ("Customs collections built the nation's lighthouses; the U.S. military and naval academies; the City of Washington; and, the list goes on."); *see also* Patrick C. Reed, *The Role of Federal Courts in U.S. Customs and International Trade Law* 9 (1997) ("[C]ustoms duties represented the largest source of federal revenue until the adoption of income taxes after the Sixteenth Amendment to the Constitution in 1913.").

[5] *E.g., U.S. Customs History* <http://www.customs.gov/about/about.htm> ("The Service collects and protects the revenue…"); *see also* 64 Fed. Reg. 13,371 (1999) ("Customs has the duty and responsibility to exercise sufficient control and to protect the revenue from any unlawful introduction of merchandise into the commerce of the country.").

tariff statutes contained no explicit mechanism for challenging duty assessments, a dissatisfied importer could nevertheless bring suit at common law against the customs collector personally.[6] Such actions initially had to be brought in state courts until Congress established the first federal removal jurisdiction for suits brought against customs officers.[7] From the outset, the courts made their own determinations as to the meaning of the tariff provisions, with no particular deference to the views of the customs officials.[8]

The volume of tariff refund suits grew enormously throughout the later nineteenth century, particularly in New York, which was by far the largest port of entry.[9] Conflicts developed in the customs decisions of different federal courts, and the complex factual and legal issues were difficult for non-specialist judges and juries.[10] In 1890, in response to the need for uniformity and expertise, Congress created a specialized tribunal, the Board of General Appraisers, to review Customs' decisions.[11] The Board's decisions were initially reviewed by federal courts of general jurisdiction; however, continuing overcrowding, conflicts between circuits, and the technical and specialized nature of customs law led Congress to create the United States Court of Customs Appeals in 1909, with exclusive jurisdiction to review final decisions of the Board of General Appraisers.[12]

The names of the specialized courts reviewing customs decisions have changed several times over the years.[13] In 1980, Congress gave the trial court hearing customs matters its present name, the United States Court of International Trade, and further expanded its jurisdiction out of concern

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[6] *See, e.g., Elliott v. Swartwout,* 35 U.S. (10 Pet.) 137, 153 (1836); *see generally* Reed, *supra* note 4, at 48-55. Because early customs procedure allowed the importer the option of securing the payment of duties by bond, many early customs suits also arose with United States as plaintiff seeking to recover duties on the bond. *See, e.g., United States v. Kid,* 8 U.S. (4 Cranch) 1 (1807); *see generally* Reed, *supra,* at 45-47 (identifying *Kid* as the first customs case to reach the Supreme Court).

[7] The first removal jurisdiction was temporary. Reed, *supra* note 4, at 50-52. In 1833, Congress permanently extended the jurisdiction of federal circuit courts to "all cases, in law or equity, arising under the revenue laws of the United States," and authorized removal "where suit or prosecution shall be commenced in a court of any state, against any officer of the United States, . . . for or on account of any act done under the revenue laws of the United States." Act of Mar. 2, 1833, ch. 57, §§ 2 & 3, 4 Stat. 632-33.

[8] *See, e.g., In re Two Hundred Chests of Tea,* 22 U.S. (9 Wheat.) 430 (1824) (rejecting Customs' interpretation of ambiguous term).

[9] *See* Reed, *supra* note 4, at 70-71 (noting that tariff cases were being filed in the Southern District of New York at three times the rate they were being decided).

[10] *See* Reed, *supra* note 4, at 71-72.

[11] *See* Act of June 10, 1890, ch. 407, 26 Stat. 131.

[12] *See* Act of Aug. 5, 1909, ch. 6, § 29, 36 Stat. 11, 105-06. *See* Reed, *supra* note 4, at 86-87 (quoting Felix Frankfurter and James M. Landis, *Business of the Supreme Court: A Study in the Federal Judicial System* 149-51 (1928)).

[13] As the Board of General Appraisers took on more judicial attributes, it was renamed the Customs Court and its members became the Justices (later redesignated as "Judges") of that court. *See* Act of May 28, 1926, ch. 411, 44 Stat. 669; Act of June 17, 1930, ch. 497, § 518, 46 Stat. 590, 737. In 1928, Congress assigned the Court of Customs Appeals jurisdiction over appeals from the Patent Office, renaming it the Court of Customs and Patent Appeals. *See* Act of Mar. 2, 1929, ch. 488, 45 Stat. 1475. In the 1950s, Congress redesignated both courts as Article III courts. Act of July 14, 1956, Pub. L. No. 84-703, § 1, 70 Stat. 532; Act of July 25, 1958, Pub. L. No. 85-755, § 1, 72 Stat. 848. *See generally* Reed, *supra* note 4, at 110-11, 118-23; Edward D. Re, *Litigation Before the United States Court of International Trade,* in 19 U.S.C.A. §§ 1-1550 at XXV, XXVI (West 1999).

that too many cases relating to imports were being heard in the district courts.[14] But throughout the changes in nomenclature, meaningful judicial review of customs decisions has been preserved, and indeed strengthened, since the founding of the Republic. For over a century, Congress has vested responsibility for that review in highly specialized courts intended to be expert in customs law.[15]

C. Tariff Classification Decisions

All "goods" imported into the customs territory of the United States are subject to the terms of the Harmonized Tariff Schedule of the United States ("HTSUS").[16] The HTSUS is a comprehensive system of categorizing all products found in international commerce and prescribing a tariff rate for them. The HTSUS consists of: the General Notes; the General Rules of Interpretation; the Additional U.S. Rules of Interpretation, the Chemical appendix; and product categories set forth in twenty-two sections, designated by 4-digit, 6-digit, or 8-digit code numbers. An extraordinarily detailed statute, the HTSUS contains some nine thousand

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[14] Customs Courts Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727. *See generally* Reed, *supra* note 4, at 166-69. When the United States Court of Appeals for the Federal Circuit was created in 1982, it was given exclusive jurisdiction over Court of International Trade appeals. *See* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25.

[15] *See, e.g.*, H.R. Rep. No. 96-466, at 3 (1979) ("The United States Court of International Trade would continue to be equipped with the same *expertise and specialized skills* that the United States Customs Court has acquired through the years.") (emphasis added).

[16] Section 1217 of the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988), *codified at* 19 U.S.C. § 1202.

product categories, which are termed Headings and Subheadings.[17]

D. How Classification Decisions Are Rendered

A tariff classification decision represents an application of law—the tariff schedules and related regulations—to a unique set of facts. Although it involves some degree of statutory construction, the classification decision is not purely an interpretation of law. Nor is a classification decision a policy judgment of general import. Rather, it is a fact-bound determination that particular goods, of particular specification and composition, are subject to tax under a particular Heading or Subheading of the HTSUS. In determining the duties assessed on a specific import transaction, Customs applies statutory (and in some cases regulatory) provisions to *the particular goods* involved.

Customs makes tariff classification decisions in two different contexts: in connection with the entry of goods into the United States, and in response to requests for prospective "rulings" in advance of importation.

1. *Classification Decisions On Liquidation*: Customs collects duties on imported goods at the time they enter the United States. The importer deposits estimated duties with the Customs Service at entry. Customs later determines the actual duties owed on the entry in "liquidation," a customs law term of art referring to the "final computation or ascertainment of the duties or drawback accruing on an entry."[18] At liquidation, Customs appraises the merchandise, and as-

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[17] *See generally* 1 Peter Buck Feller, *U.S. Customs and International Trade Guide* § 6.02 (1999) (describing organization of the HTSUS).

[18] 19 C.F.R. § 159.1; *see also* 19 U.S.C. § 1500; 19 C.F.R. § 159.6 (explaining procedures on liquidation).

certains the classification and rate of duty. A liquidation is the government's final accounting with the importer as to the taxes owed, and is "final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section . . . ."[19] An aggrieved importer may file an administrative protest within ninety days of the notice of liquidation, and if Customs decides to deny the protest, its decision is subject to judicial review in the Court of International Trade.[20]

2. *Classification Rulings*: Importers also have the option of obtaining a ruling on the classification of goods prior to their importation. The importer submits to Customs a sample or a detailed description of the merchandise, and receives from Customs a binding "ruling letter" setting out the agency's decision on classification.[21] The importer then attaches the ruling letter to the documents filed upon entry of merchandise, ensuring that Customs will liquidate the entry consistent with the ruling it has already made.[22]

E. Customs' Handling Of Ruling Requests

Importers may request Customs rulings as to classification, as well as a number of other matters. A Customs ruling "interprets and applies the provisions of the Customs and related laws to a specific set of facts."[23] Thus, Customs rulings are not available to interpret the tariff schedules in the abstract or to address hypothetical questions; rather, a ruling

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19 19 U.S.C. § 1514(a).

20 19 U.S.C. § 1514(c); 28 U.S.C. § 1581(a).

21 19 C.F.R. §§ 177.2; 177.1(d); 177.8.

22 19 C.F.R. § 177.8(a)(2).

23 19 C.F.R. § 177.1(d)(1).

must relate to "a specifically described Customs transaction."[24]

An importer has the option to address a request for a classification ruling to many different places—either to the Director, National Commodity Specialist Division, in New York, or "to any service port of the U.S. Customs Service."[25] Customs operates forty-five such "service ports," from Anchorage to Miami, which offer "a full range of cargo processing functions."[26] The importer submits information to the appropriate office at Customs, and Customs issues a decision.[27] Thus, ordinary rulings are issued without any notice to, or opportunity for comment by, anyone other than the person requesting the ruling.[28]

F. Judicial Review Of Classification Determinations

Judicial review of Customs classification decisions, whether made in connection with liquidation or in

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24 19 C.F.R. § 177.8(a)(1); *see* 19 C.F.R. § 177.7 ("no ruling letter will be issued with regard to transactions or questions which are essentially hypothetical in nature . . . .").

25 19 C.F.R. § 177.2(a).

26 19 C.F.R. §§ 101.1 (definition of service port), 101.3(b)(2) (list of service ports).

27 19 C.F.R. § 177.2(b) (specifying form and content of ruling request).

28 Customs also issues a limited number of decisions of general applicability, published with notice and an opportunity for comment, which have the effect of changing a practice or position of the Customs Service. 19 C.F.R. § 177.10(c). Confusingly, these decisions are also designated "rulings," the same term used for the case-specific decisions. The court of appeals here reserved decision as to whether such general-applicability "rulings," adopted after notice-and-comment, are entitled to deference. *See Mead Corp. v. United States*, 185 F.3d 1304, 1307 n.1 (Fed. Cir. 1999).

connection with rulings, takes place in the Court of International Trade. That court has exclusive jurisdiction to review the denial of a protest of a liquidation, as well as to review Customs rulings made prior to importation.[29]

In reviewing the denial of a protest, the Court of International Trade makes its "determinations upon the basis of the record made before the court"—a standard understood as *de novo* review.[30] The court reviews Customs rulings under the familiar standards of the Administrative Procedure Act (APA), setting aside any Customs decision it determines to be, *inter alia*, "arbitrary, capricious, an abuse of discretion, or otherwise contrary to law."[31] As a practical matter, since the ultimate question of the proper classification of goods is a question of law reviewed *de novo*, the standard is the same for the review of protest denials as for the review of rulings.[32] This is logical, since the only difference between a classification decision made at liquidation and one made in a

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[29] 28 U.S.C. § 1581(a) (protests); *id.* § 1581(h) (rulings).

[30] 28 U.S.C. § 2640(a); *see* Reed, *supra* note 4, at 256-61 (noting that Customs law "is one of the rare areas of administrative law in which de novo review is important.").

[31] *See* 28 U.S.C. § 2640(e) (incorporating standard of review of 5 U.S.C. § 706). Consistent with the limited, fact-specific applicability of rulings, an action challenging a ruling may only be commenced "by the person who would have standing to bring a civil action under section 1581(a) of this title if he imported the goods involved and filed a protest which was denied . . . ." 28 U.S.C. § 2631(h).

[32] *See* Reed, *supra* note 4, at 255 ("The APA instructs reviewing courts to select among the same standards defined under the specific statutory rights of action in the CIT: as appropriate, either de novo review, the 'arbitrary, capricious' test, or the 'substantial evidence test.'").

ruling is timing—whether the decision is made before or after importation of the merchandise.[33]

SUMMARY OF THE ARGUMENT

In seeking *Chevron* deference for the Customs Service's classification decisions, the government seeks to overturn two centuries of precedent under which both the factual and legal aspects of such determinations are reviewed *de novo*, without deference to Customs.

Customs classification decisions are case-specific applications of law to fact, not the pure questions of statutory construction and policymaking contemplated by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Furthermore, *Chevron* deference presumes that Congress intended that any gaps or ambiguities it left in a statute should be filled by the expert agency charged with administering it. This presumption breaks down in the face of the statutory scheme of customs law, in which Congress charged a highly specialized court of expert judges with reviewing *de novo* the agency's application of an exceptionally detailed statute to particular goods. *Chevron* deference does not logically extend to such classification decisions, and would be inconsistent with the Court's precedent, which for

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[33] The government erroneously argued in the court of appeals that judicial review of Customs decisions takes place pursuant to the APA. *See* Suppl. Post-Arg. Br. of Appellee at 7-9. The APA only applies to "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Here, because 28 U.S.C. § 1581 specifically provides a mechanism for judicial review, that statute, rather than the APA, governs review. Although section 1581(h) incorporates the APA's standard, this case was actually brought to review the denial of a protest, and the basis of jurisdiction was section 1581(a), under which review is *de novo*. 28 U.S.C. § 2640(a).

200 years has given no deference to the government's classification of goods under the tariff laws.

Nor is there any justification for distinguishing classification decisions made on rulings from those made at liquidation. Both types of decisions are equally narrow and fact-specific, limited to the particular merchandise under review. Any attempt to give greater deference to rulings than to decisions on liquidation would discourage importers from using the ruling request process, contrary to the intent of Congress.

Likewise, there is no basis for giving deference to Customs' rulings generally. A rulings is limited to the particular transaction under review and to the party that requested the ruling. Rulings are issued by many offices within Customs, in large volume, with no notice or opportunity for public comment.

ARGUMENT

I. ORDINARY CLASSIFICATION DECISIONS ARE NOT ENTITLED TO *CHEVRON* DEFERENCE

The government's argument that all classification decisions, wherever and however they are made, are subject to *Chevron* deference, is unsupported by *Chevron* and contrary to two centuries of precedent that does not accord such deference.

A. *Chevron* Does Not Justify Deference To Customs Classification Decisions

Chevron requires a court reviewing an agency's construction of the statute that it administers to consider whether Congress "has directly spoken to the precise question at issue." 467 U.S. at 842. If the statute is "silent or ambiguous with respect to the specific issue," the agency's interpretation must be upheld so long as it is a "permissible" or "reasonable" construction of the statute. *Id.* at 843-44. Such deference derives from the fact that the power of an agency to administer a program "necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Id.* So long as the agency has made "a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute," its policy choice should not be disturbed. *Id.* at 845. *Chevron* is inapplicable here because a tariff classification is a highly particularized, mixed question of fact and law, subject to *de novo* judicial review, not a policy choice that has been delegated to Customs.

1. A classification decision, unlike the regulations given deference in *Chevron* and in *United States v. Haggar Apparel Co.*, 526 U.S. 386 (1999), does not merely construe a statute. Rather, it involves both the legal issues of the scope and meaning of the tariff provisions *and* the factual issues of what the subject merchandise is. The ultimate question in tariff classification resembles what the Court in other contexts has characterized as a mixed question of law and fact, "involving as it does the application of a legal standard to a particular set of facts."[34] Courts generally review such mixed questions *de novo*.[35]

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[34] *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 450 ('1976) (materiality of facts omitted from a corporate proxy statement is a mixed question of fact and law"); *see Thompson v. Keohane*, 516 U.S. 99, 112 (1995) (ultimate question of "in custody" for purposes of *Miranda* warnings is a mixed question that "calls for the application of the controlling legal standard to the historical facts"); *Bose Corp. v. Consumers Union*, 466 U.S. 485, 501 & n.17 (1984) ("actual malice" in a defamation suit is a mixed question; "A finding of fact in some cases is inseparable from the principles through which it was deduced."); *Pullman-Standard v. Swint*, 456 U.S. 277, 289 n.19 (1982) (discriminatory intent is a mixed question); *see also Bausch & Lomb, Inc. v. United States*, 957 F. Supp. 281, 284-85 (Ct. Int'l Trade 1997) (relying on *TSC v. Northway*, *Thompson v.*

(Footnote cont'd on next page)

Although a degree of statutory construction may be involved, a classification decision is a highly specific, fact-bound determination that does not possess the "authoritativeness" or "deliberateness" required for *Chevron* deference.[36] In classifying merchandise, whether on liquidation of an entry or in a pre-importation ruling, Customs does not lay out a legal interpretation of the HTSUS separate from the factual aspects of the case before it.[37] Instead, it applies the criteria of the tariff schedule to the specific merchandise it reviews. *Chevron* deference to an administrative decision on a mixed question of law and fact, such as tariff classification, simply is not appropriate.

(Footnote cont'd from previous page.)

Keohane, and *Pullman-Standard*, to hold that the ultimate issue of tariff classification is a mixed question of law and fact "because it involves the application of a legal standard, *i.e.*, a tariff subheading, to a particular set of facts, *i.e.*, the item properly described"), *aff'd* 148 F.3d 1363 (Fed. Cir. 1998).

[35] *See Bose Corp.*, 466 U.S. at 501 (the "clearly erroneous" standard accorded findings of fact under Fed. R. Civ. P. 52(a) "does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact.").

[36] *See Smiley v. Citibank*, 517 U.S. 735, 741, 743 (1996) (an "opinion letter" of the Office of the Comptroller of the Currency, unlike a "full-dress regulation, issued by the Comptroller himself and adopted pursuant to the notice-and-comment procedures of" the APA, did not establish "a binding agency policy" because "it only purported to represent the position of the Deputy Chief Counsel in response to an inquiry concerning *particular* banks.") (emphasis added).

[37] As explained at 7-8, *supra*, liquidation is the "final computation or ascertainment of the duties or drawback accruing on an entry." 19 C.F.R. § 159.1

Far from reflecting an agency's "continuing responsibilities and policy-implementing perspectives," to which the government claims deference is due, tariff classification decisions are actually more akin to the "sporadic and case-specific . . . encounters with issues of statutory meaning" to which the government likens judicial involvement with administrative law. Gov't Br. 25 n.11. *Chevron* deference does not apply to this situation.

2. The statutory scheme of customs law, which includes judicial review by specialized courts, indicates that Congress could not have intended the sort of deference contemplated by *Chevron*. The decisions of most agencies are reviewed by non-expert judges sitting on courts of general jurisdiction. But for over 100 years, issues of customs law have been heard by specialized courts with great expertise. Thus, one rationale the government advances for deference—the assumption that an agency has greater expertise than its reviewing court, *see* Gov't Br. 25 n.11—does not apply to the Customs Service in the way it does to other agencies.

The Court of International Trade is in daily contact with customs law. With no jurisdiction over criminal matters or suits between private parties, the Court of International Trade deals exclusively with Title 19 of the U.S. Code, containing the customs law. The expert judges of that court are at least as qualified to construe the complex tariff provisions as are the Customs personnel who make classification decisions.

Congress' creation of the Court of International Trade and its predecessors, with jurisdiction to review *de novo* the factual as well as legal issues in classification decisions, indicates that Congress intended searching judicial review that would be inconsistent with broad deference to the views of the Customs Service. *Chevron* deference is based on

> a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency,

> understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.

Smiley, 517 U.S. at 740-41. The "presumption" on which *Chevron* is based fails in the case of customs classification decisions. There would be little point in having a specialized court to hear tariff classification and other customs law disputes if that court were merely required to defer to the decisions of the Customs Service. Thus, the establishment of the Court of International Trade indicates that Congress could not have intended deference to classification decisions.

3. *Chevron* deference to classification decisions would be inconsistent with the *de novo* review such decisions receive in the Court of International Trade. Congress has provided that the Court of International Trade "shall make its determinations upon the basis of the record made before the court," and that if it "is unable to determine the *correct* decision on the basis of the evidence presented," it may order retrial, rehearing, or further administrative or adjudicative procedures "as the court considers necessary to enable it to reach the *correct* decision." 28 U.S.C. §§ 2640(a), 2643(b) (emphasis added). In *Haggar*, the Court explained that *de novo* review was consistent with deference to agency *regulations*, which "establish legal norms" that are applied to the facts of a specific case: "Deference can be given to the regulations without impairing the authority of the court to make factual determinations, and to apply those determinations to the law, *de novo*." 526 U.S. at 391. But unlike regulations, a classification decision does not "establish legal norms"—on the contrary, it determines the ultimate issue in the case. The Court of International Trade would not be able to "make factual determinations and apply them to the law, *de novo*," if it were required to give deference to the Customs Service's

application of facts to law. Logically, *Chevron* cannot apply in this situation.

4. The structure of the HTSUS, and the highly particularized nature of classification decisions, is also inconsistent with giving *Chevron* deference to those decisions. Deference under *Chevron* is due when "the court determines that Congress has not directly addressed *the precise question* at issue." 467 U.S. at 843 (emphasis added). In the arena of classification, Congress of course has never literally addressed "the precise question at issue," because "the precise question" is which tariff classification applies to *specific* merchandise. The HTSUS contains both narrow categories and broader, catch-all provisions; thus, there may be several possible classifications available for a product. If Customs were required merely to choose any "reasonable" classification, it would be able to select the highest duty arguably applicable. The fact-specific nature of classification decisions would effectively insulate them from judicial review if they were given *Chevron* deference; deference would mean that *every* Customs classification decision would have to be upheld unless it was completely unreasonable.

B. Deference To Classification Decisions Would Be Inconsistent With Settled Precedent

Throughout the 200-year history of customs law, the Court has never given classification decisions anything resembling the deference accorded an agency's pure statutory construction under *Chevron*.

1. The Court's precedent of the past two centuries shows no particular deference to decisions of the Customs Service. Although deference to an agency's interpretation of a statute was recognized even early in the nineteenth century, *see Edwards' Lessee v. Darby*, 25 U.S. (12 Wheat.) 206, 210 (1827), the Court did *not* apply such deference to the classification decisions of customs collectors.

One of the earlier classification cases, *In re Two Hundred Chests of Tea*, 22 U.S. (9 Wheat.) 430 (1824), concerned the meaning of the term "bohea tea" in the tariff statutes. Customs officials interpreted the term as describing the historical or scientific classification of tea, a seemingly reasonable interpretation of an ambiguous term. *Id.* at 438. But Justice Story rejected the government's reading of the statutory provision, holding that the term "bohea tea" must be interpreted according to its ordinary commercial usage, not the meaning the government sought to give it. *Id.* at 438-39. The Court reversed the customs officials' interpretation, with no hint of deference.

Similarly, customs officials in *Curtis v. Martin* had classified "gunny cloths," used for bagging cotton, as "cotton bagging," which was subject to duty. 44 U.S. (3 How.) 106, 109 (1845). The government argued that the ambiguous term "cotton bagging" in the tariff schedule applied to "all articles used for bagging cotton." *Id.* Chief Justice Taney rejected the government's interpretation, holding that because gunny cloths were not used for bagging cotton at the time the tariff statute had been enacted, Congress could not have intended to tax them as such.

Likewise, in *Merritt v. Welsh*, the Court overturned Customs' classification of sugar according to its quality. 104 U.S. 694 (Oct. Term 1881). Relying upon "treasury instructions," customs officials had attempted to measure the quality of the sugar according to its "saccharine strength as ascertained by chemical tests," rather than purely by its color, as provided in the tariff schedules. *Id.* at 700. The Court flatly rejected the notion that Customs was entitled to recognize the improvements in sugar manufacture and techniques for measuring its quality, and interpret the statute to effect what it considered to be its purpose: "If Congress, as it has done, adopt the color standard, it is not for the Customs department to adopt a different one." *Id.* at 701. Far from deferring to the expertise of Customs, the Court said: "Discretion in the custom-house officer should be limited as strictly as possible. It has been said with much truth, 'Where law ends, tyranny begins.' " *Id.* at 702.

In these and other cases, the Court has not hesitated to interpret and apply the tariff statutes without deference to the views of the Customs Service.[38]

2. The government relies on *United States v. Vowell*, 9 U.S. (5 Cranch) 368 (1809), for the proposition that decisions affording "broad deference to the views of the federal officials who administer tariff legislation date to the very beginning of the customs laws." Gov't Br. 20. However, on careful reading, the case actually demonstrates the opposite.

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[38] In a number of other cases, the Court has given no deference to the government's classification determination. *See, e.g., Goat & Sheepskin Import Co. v. United States*, 206 U.S. 194 (1907) (rejecting government's application of ambiguous term "wool" in the tariff schedules to a substance found on sheepskin, but known in the trade as "Mocha hair"); *American Net & Twine Co. v. Worthington*, 141 U.S. 468 (1891) (rejecting government's application of ambiguous term "flax or linen thread" in tariff schedule to a thread made of linen but used as "gilling twine," another tariff term); *Arthur v. Stephani*, 96 U.S. 125 (Oct. Term 1877) (government erred in classifying chocolate "presented in a form in which it was ordinarily sold as confectionery" as "confectionery" rather than "chocolate"); *Arthur v. Zimmerman*, 96 U.S. 124 (Oct. Term 1877) (government erred in classifying "hat braids" under general tariff provision for "cotton braids, insertings, lace trimmings, or bobbinets"); *Arthur v. Morrison*, 96 U.S. 108 (Oct. Term 1877) (rejecting government's application of tariff term "silk veils" to veils made of silk but commercially known as "crape veils"); *Elliott v. Swartwout*, 35 U.S. (10 Pet.) 137, 150-53 (1836) (rejecting government's application of ambiguous statutory term "manufactures of wool," which the Court termed "obscure, and not susceptible of an interpretation entirely satisfactory," to "worsted shawls with cotton borders and worsted suspenders with cotton ends or straps").

The issue in *Vowell* was not classification, but rather the time when goods are deemed to be imported into the United States. In late December 1807, a cargo of salt came to anchor within the "collection district," but sixteen miles south of the actual "port" of Alexandria, Virginia. The tariff on salt expired on December 31, 1807, and the vessel was not brought to port until January 1, 1808. Nevertheless, customs officials demanded payment of the tariff, arguing that the duty attached when the salt arrived within the district. The Court did not defer to the government's interpretation of the meaning of the statutory phrase "imported into the United States." Rather, it rejected the government's position as inconsistent with the way it had treated arrival at port in situations where the tariff had *increased* rather than decreased. Chief Justice Marshall's statement, that "if the question had been doubtful the court would have respected the uniform construction which it is understood has been given by the treasury department of the United States upon similar questions," does not reflect deference, but rather the opposite—a determination not to allow the government to maximize revenues by taking inconsistent positions:

> It is understood that in case of an increase of duty, the United States have always demanded and received the additional duty if the goods have not arrived at the *port of entry* before the time fixed for the commencement of such additional duty, although the vessel may have arrived within the collection district before that time. The same rule of construction is to be observed when there is a diminution of duty.

9 U.S. (5 Cranch) at 372 (emphasis added). If anything, *Vowell* demonstrates that even 200 years ago, customs officials had a propensity to take inconsistent positions so as to maximize revenues. *Vowell* thus demonstrates the need for careful judicial review of Customs' activities, and the danger

in giving "deference" to Customs' application of the tariff provisions.

II. CLASSIFICATION DECISIONS MADE IN PRE-IMPORTATION RULINGS SHOULD RECEIVE NO MORE DEFERENCE THAN THOSE MADE AT LIQUIDATION

The defects in the government's argument that classification decisions are entitled to *Chevron* deference cannot be overcome by limiting such deference to classification decisions made in pre-importation "rulings" rather than those made at liquidation. According deference to classification decisions made upon ruling requests, but not to those made at liquidation, would be inconsistent with the relationship between rulings and liquidations, and inconsistent with the purpose of the ruling mechanism.

A. There Is No More Basis For Giving Deference To Classification Rulings Than For Giving Deference To Other Customs Classification Decisions

Classification decisions made in pre-importation rulings are just as fact-bound and case-specific as those made in liquidation; the only difference is timing.[39] Thus, rulings on tariff classifications should be given no more deference than classification decisions made at liquidation.

Nothing in the nature of rulings indicates that they are entitled to any greater weight than decisions in liquidation.

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[39] The case-specific nature of rulings, and their equivalence to decisions made on liquidation, is borne out by the fact that judicial review of rulings is available only if the party commencing the civil action "would be irreparably harmed unless given an opportunity to obtain judicial review prior to" importation. 28 U.S.C. § 1581(h). Otherwise, the party must import the goods, pay the tax, and seek judicial review upon denial of its protest. *Id.*

The regulations specifically provide that a tariff classification ruling "will be applied only with respect to transactions involving articles *identical* to the sample submitted with the ruling request or to articles whose description is *identical* to the description set forth in the ruling letter." 19 C.F.R. § 177.9(b)(2) (emphasis added). A ruling letter "represents the official position of the Customs Service *with respect to the particular transaction or issue described therein*," is "binding" on Customs and the individual importer "until modified or revoked," and "may be cited as authority in the disposition of transactions involving the *same* circumstances." 19 C.F.R. § 177.9(a) (emphasis added). The regulations specifically caution that "no other person should rely on the ruling letter or assume that the principles of that ruling will be applied in connection with any transaction other than the one described in the letter." 19 C.F.R. § 177.9(c). Classification rulings are just as narrow, limited, and fact-specific as the classification decisions made at the time of importation. There is no basis for giving them any greater deference.

B. Giving Deference To Rulings Would Discourage Their Use

Giving greater deference to classification decisions on ruling requests than that given to classification decisions on liquidation would discourage importers from using ruling requests. Such a result is contrary to Congressional intent, which has been to encourage the use of ruling requests.

Customs rulings help the international trade community make effective business decisions by allowing them to ascertain in advance what duties will be owed on merchandise. For example, an advance classification ruling can have an important bearing on the price an importer negotiates with a foreign producer, on the importer's resale price, or on the

acquisition of a foreign manufacturing facility to supply the U.S. market.[40]

Congress has also encouraged importers to use the rulings request process. Current customs law provides that importers may be liable for civil penalties for failing to exercise "reasonable care" in declaring the value, classification, and rate of duty on imported merchandise.[41] Congress specifically intended that importers seek rulings as a means of exercising "reasonable care":

> In meeting the "reasonable care" standard, the Committee believes that an importer must consider utilization of one or more of the following aids to proper compliance: seeking guidance from the Customs Service through the pre-importation or formal ruling program . . . . If the above steps are taken, the importer will be presumed to have acted with "reasonable care" in making entry.[42]

But if rulings are given greater deference than decisions made upon liquidation, an adverse decision from Customs in

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[40] *See* 1 Peter Buck Feller, *U.S. Customs and International Trade Guide* § 4.01 (1999); *see also* U.S. General Accounting Office, *Office of Regulations and Rulings Has Yet to Establish Performance Measures* 2 (1997) (noting that "representatives from the trade community we interviewed" reported that "rulings provided important analyses and information about the duties they should expect to pay on the goods they import," and that they were "crucial to their ability to make effective business decisions and comply with Customs' regulations.").

[41] 19 U.S.C. § 1484(a)(1) ("importer of record . . . shall, using reasonable care . . . complete the entry by filing with the Customs Service the declared value, classification and rate of duty applicable to the merchandise.")

[42] H.R. Rep. No. 103-361, pt. 1, at 120 (1993), *reprinted in* 1993 U.S.C.C.A.N. 2552, 2670.

a ruling would be more difficult to overturn on judicial review than the same decision reached through protest of the liquidation of an entry. Such a situation would discourage importers from seeking rulings, contrary to the Congressional intent to encourage the use of rulings. Importers would be in the untenable position of having to choose whether to risk penalties by not seeking a ruling, or to seek a ruling which may be more difficult to overturn on review.

III. THERE IS NO BASIS FOR GIVING *CHEVRON* DEFERENCE TO CUSTOMS RULINGS

Customs rulings are different from the formal agency pronouncements to which *Chevron* deference has been given. Extending *Chevron* deference to embrace Customs Service rulings would be inconsistent with the nature of rulings and contrary to the scheme of customs law.

A. Customs Rulings Have A Different Character From The Agency Actions To Which The Court Has Given *Chevron* Deference

The government rather grandly portrays Customs' routine issuance of ruling letters in response to specific requests as "the formal adoption and issuance of binding interpretive rulings." Gov't Br. 29. But in fact, ruling letters are at the opposite end of the spectrum from the "full-dress regulations" to which *Chevron* deference is owed. *Cf. Smiley v. Citibank*, 577 U.S. at 741.

1. Ruling letters are not agency pronouncements of general applicability, but rather are narrow, fact-bound decisions, of no precedential value, and intended only for the use of the person to whom they are directed. A ruling is defined as "a written statement" that "interprets and applies the provisions of the Customs and related laws *to a specific set of facts*." 19 C.F.R. § 177.1(d)(1) (emphasis added). A Customs ruling may be sought only for "a specifically described

Customs transaction." 19 C.F.R. § 177.8(a)(1). Indeed, far from offering general guidance, "no ruling letter will be issued with regard to transactions or questions which are essentially hypothetical in nature . . . ." 19 C.F.R. § 177.7(a).

The government correctly points out that rulings represent "the official position of the Customs Service with respect to the *particular transaction or issue* described therein," that they "may be cited as authority in the disposition of transactions involving *the same circumstances*," and that they therefore are "binding" on Customs personnel and applicable to "all entries which are unliquidated" at the date of issuance. 19 C.F.R. § 177.9(a) (emphasis added). But unlike formal regulations or other agency pronouncements of general applicability, ruling letters are *not* precedential as to *other* transactions.[43] Rather, consistent with their non-precedential character, rulings are subject to "modification or revocation without notice to any person, except the person to whom the letter was addressed." 19 C.F.R. § 177.9(c). "Accordingly," warns Customs, "no other person should rely on the ruling letter or assume that the principles of that ruling will be applied in connection with any transaction other than the one described in the letter." *Id.* Such limited, case-specific decisions on particular transactions are not the sort

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43 "The applicable regulations . . . are not a model of clarity. It is apparent, however, from the language of 19 C.F.R. § 177.9, that ruling letters are not issued by the Customs Service with the expectation that they can generally be relied upon. Rather, they are intended to apply to a specific set of circumstances." *Superior Wire v. United States*, 867 F.2d 1409, 1413 (Fed. Cir. 1989).

of general statements of official agency policy to which *Chevron* deference might be owed.[44]

2. Ruling letters are issued by a number of different offices within Customs. In addition to the National Commodity Specialist Division in New York, forty-five different service ports are authorized to issue rulings.[45] Requests for valuation and carrier rulings are sent to the Office of Regulations and Rulings at Customs Headquarters in Washington.[46] It would be illogical to give deference to rulings from *all* of those offices. The decentralized nature of the ruling process demonstrates that rulings are not the settled or official position of the head of the agency, and not the sort of definitive pronouncements entitled to *Chevron* deference.

3. Ruling letters are not subject to the notice-and-comment procedure of the APA.[47] The absence of an opportunity for public comment is understandable, given the vast quantities of ruling letters issued: The government advises that Customs Headquarters alone issues over 1000 rulings per year. Gov't Br. 38 n.26. In addition, the service ports issue even more rulings, which are not included in that figure. Decisions being churned out at the rate of three per day,

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[44] *Cf. Smiley*, 517 U.S. at 741; *United States v. Correll*, 389 U.S. 299, 302 (1967) (deference to general rule which avoided a "purely case-by-case approach" to tax law).

[45] 19 C.F.R. § 177.2(a) (procedures for classification rulings); § 101.3(b)(2) (list of service ports).

[46] 19 C.F.R. § 177.2(a).

[47] Only a limited number of decisions—those changing a practice—are required to be made after notice and comment. 19 C.F.R. § 177.10(c). Those decisions, which are also called "rulings," are *not* at issue here, and the court of appeals reserved judgment on them. *Mead Corp.*, 185 F.3d at 1307 n.1.

without benefit of the "notice-and-comment procedures of the Administrative Procedure Act designed to ensure due deliberation," cannot be regarded as having the "deliberateness" and "authoritativeness" of the agency positions to which the Court gives *Chevron* deference. *See Smiley*, 517 U.S. at 741.

B. There Is No Indication That Congress Intended Customs Rulings To Receive Deference

The government makes much of the statutory language authorizing Customs to issue "binding rulings," arguing that this language renders rulings "formal interpretations" in "the format authorized by Congress for this purpose." *See* Gov't Br. 15, 23, 29, 31 (citing 19 U.S.C. § 1502(a)). This argument overstates the significance of the term "binding."

The "binding rulings" language of Section 1502(a) was added in 1993.[48] The purpose of the amendment was to provide certainty to *importers*, not to give greater deference to Customs: "These amendments will provide greater certainty to *importers* through the binding rulings program while also permitting Customs to accelerate the entry process."[49] The term "binding" simply indicates that the importer may rely upon the ruling, and that Customs officials at all ports will be constrained to follow the ruling, as to *those particular goods*.

The reason for making the rulings "binding" is to permit the importer to rely on them and to prevent inconsistent decisions by officials in different ports. The statute does *not* make the rulings "binding" as to anyone other than the im-

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[48] Pub. L. No. 103-182, § 640, 107 Stat. 2057, 2203 (1993).

[49] H.R. Rep. No. 103-361, pt. 1, at 138, 1993 U.S.C.C.A.N. at 2688 (emphasis added).

porter who requested it. The rulings certainly are not binding upon the judiciary, and are not entitled to judicial deference.

IV. DEFERENCE IS INAPPROPRIATE IN THE MANY OTHER CONTEXTS IN WHICH CUSTOMS ISSUES RULINGS

In addition to rulings concerning tariff classifications, the context in which this case arises, Customs uses the same administrative mechanism to issue rulings on a number of other subjects—country of origin and country of origin marking, drawback, foreign trade zones, customs bonds, customs brokers, and other matters. Giving *Chevron* deference to classification rulings could suggest that deference should apply to rulings in *all* of these contexts, depriving importers of meaningful judicial review in circumstances far beyond this case.

One context in which deference would be particularly inappropriate is customs rulings interpreting judicial decisions. When Customs receives an adverse judicial decision, it may attempt to contain the effect of that decision by issuing what it terms a "limiting ruling":

> A published ruling may limit the application of a court decision to the specific article under litigation, or to an article of a specific class or kind of such merchandise, or to the particular circumstances or entries which were the subject of the litigation.

19 C.F.R. § 177.10(d). Although Congress has recognized that Customs may issue such rulings, *see* 19 U.S.C. § 1625(d), there is no indication that it believes they are entitled to any deference.

For the courts to give "deference" to a Customs Service interpretation the HTSUS which is designed to limit the application of a judicial decision would make no sense.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Federal Circuit.

Respectfully submitted,

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No. 99-1434

IN THE

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UNITED STATES OF AMERICA,
Petitioner,

v.

THE MEAD CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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Brief of Filofax Inc., *Amicus Curiae*, in Support of Respondent

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THE MEAD CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

Brief of Filofax Inc., *Amicus Curiae*, in Support of Respondent

INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Filofax Inc. ("Filofax") is the importer and U.S. distributor of the famous "Filofax" line of personal

[1] Pursuant to S. Ct. R. 37.6, *amicus curiae* states that counsel for the parties hereto did not author this brief in whole or in part, and that no person or entity other than *amicus curiae* and its counsel have made a monetary contribution towards its preparation or submission. Letters from the parties hereto consenting to the filing of this brief have been lodged with the Clerk.

organizers, created in England almost 80 years ago. Filofax organizers resemble respondent's "day planners" in that they feature engagement calendars,[2] telephone/address grids, plain note paper, and other items inserted into a loose-leaf binder. Pet. App. 19a. Filofax has three civil actions pending in the Court of International Trade, and numerous protests pending before the U.S. Customs Service ("Customs"), on the merits of the tariff classification issues raised herein with respect to Filofax organizers entered on and after November 26, 1995.[3]

In the course of its litigation against Customs in this matter, Filofax has developed certain insights into the merits of the issues, which may assist the Court in its deliberations. In particular, the British origin of Filofax organizers, which still influences their design, gives Filofax a unique insight into the meaning of the word "diary" that may prove decisive in the Court's consideration of the merits of this case.

SUMMARY OF ARGUMENT

1. Customs' determinations of the common meaning of tariff terminology are not entitled to deference from the courts. Unlike the statutory constructs, abstractions, and generalizations that characterize classic *Chevron* deference cases, and customs cases in which the courts have accorded *Chevron* deference to Customs' statutory interpretations, tariff terminology is intrinsically precise because it denominates tangible articles bought and sold in commerce. Absent a

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[2] For reasons explained herein, the engagement calendar section of a Filofax organizer is labeled a "Diary".

[3] Filofax's civil actions in the Court of International Trade involving the tariff classification of its organizers entered before November 24, 1995, were stipulated in Filofax's favor on procedural grounds.

demonstrated commercial meaning or an explicit statutory definition, a tariff term has only one possible meaning -- its common meaning at the time the tariff law was enacted. That common meaning is to be correctly ascertained -- not devised, or selected from a menu of possible interpretations, in the exercise of agency discretion implicitly delegated by Congress.

Petitioner asserts that the courts must defer to Customs' tariff classification decisions in their entirety if "reasonable" in light of the information before the agency. Affording such deference would turn tariff classification cases into reviews of Customs' protest decisions on the agency record. This result would violate 28 U.S.C. § 2640(a)(1), which requires that classification cases be tried in the Court of International Trade "on the basis of the record made before the court."

Petitioner's policy arguments in favor of deference to Customs classification rulings, based upon agency expertise and nationwide powers, do not apply in the context of tariff classification decisions. On the other hand, according deference to Customs rulings will discourage importers from seeking Customs' guidance, since they will know that they will be at a serious disadvantage in challenging Customs' treatment of their importations in court if they have received a pre-importation ruling on the issues.

2. Customs determination in HQ 955937 that respondent's day planners are "diaries" under HTSUS 4820.10.20 disregards the separate classification of articles "similar to diaries" and is unlawfully based upon the British usage of the word "diary." Customs relies upon its own precedent, *i.e.*, "this office has consistently determined that articles *similar* in design and/or function to [respondent's day planners] are classifiable as diaries" in HTSUS 4820.10.20 (emphasis added). Pet. App. 31a; Pet'r Br. at 35. If respondent's day planners are "*similar* in design and/or function" to articles previously classified as "diaries" in HTSUS 4810.10.20, then they are properly

classified in HTSUS 4820.10.40 as articles *similar* to diaries.

The crux of HQ 955937 is Customs' exclusive reliance upon the second definition of "diary" from the *Oxford English Dictionary*. Customs reads this definition to include a blank book for noting future appointments. Other *Oxford* dictionaries explicitly define "diary" to include a blank, dated book for noting future engagements, while *Webster's* and *American Heritage* dictionaries do not do so. The difference between these dictionaries can be resolved and explained, and the *Webster's/American Heritage* definition clearly is correct:

a). *Webster's New World College Dictionary* is the official authority in word usage for the two major U.S. wire services, a major national financial newspaper, and three of the pre-eminent major U.S. city newspapers. This circumstance alone favors *Webster's* over *Oxford* on general issues of common meaning.

b) The *Webster's* and *Oxford* definitions both reflect the common meaning of the word "diary" -- *Webster's*, in the United States, and *Oxford*, in Great Britain.

For the common meaning of tariff terms, Customs and the courts must look to American usage (See, e.g., *Two Hundred Chests of Tea*, 9 Wheat. 430, 438 (1824)), and so the *Webster's* definition of "diary" should apply under HTSUS 4820.10.20.

Customs knowingly violated this principle in HQ 955937 by selecting the *Oxford* definition. In HQ 953413, March 29, 1993, Customs explained that it selected the broader *Oxford* definition of "diary" because the narrower *Webster's* definition "would place a narrow construction on the interpretation of the nomenclature at the international level." Customs understands and applies the American usage principle, however, when articles other than day planners are involved. *See* HQ 954022, August 8, 1994, and HQ 952530, June 9, 1994., in which Customs adopted the American meaning of "T-shirt" to exclude long-sleeved shirts, even though, at the international level, a T-

shirt may be long-sleeved.

In sum, based upon the correct and lawful lexicographic authority, *Webster's*, respondent's day planners are the same as diaries in that they are blank books with dated pages, but they differ from diaries in that they are designed and used to note future appointments, events, and the like rather than to record present events. Accordingly, they are properly classified in HTSUS 4810.10.40. The court of appeals' decision to this effect is correct, and Customs' determination to the contrary in HQ 955937 is erroneous.

3. Customs' determination that diaries in loose-leaf ring binders are "bound" under HTSUS 4820.10.20 is an unlawful, "backwards" exercise in tariff classification, reflects an impermissible interpretation of the term "bound," is erroneous even under that interpretation, and is otherwise insupportable.

Customs' determination that diaries in loose-leaf ring binders are "bound" under HTSUS 4820.10.20 is supposed to be a conclusion reached by ascertaining the common and commercial meaning of "bound" in HTSUS 4820.10.20, then applying that meaning to the features and functions of a loose-leaf ring binder. *Hewlett-Packard Co. v. United States*, 189 F.3d 1346, 1348 (Fed. Cir. 1999), *citing Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1391 (Fed. Cir. 1994). In HQ 955937, however, Customs ran the tariff classification process backwards -- first, concluding that loose-leaf ring binders make "bound" diaries under HTSUS 4820.10.20, then, "[l]astly," employing "a semantical approach to the issue" in order to synthesize a compatible definition of "bound," *i.e.*, "held together in a fixed order". Pet. App. 46a. As a matter of tariff classification procedure, this is unlawful.

Customs' other stated grounds for its determination are baseless. Customs framed the issue in terms of what is a "bound diary," and posited that "there is no requirement that a diary be in the format of a book". Pet. App. 44a, Pet'r. Br. 35-36. That

very requirement, however, is reflected in the *Oxford English Dictionary* definition of "diary" which Customs embraced in the decision. Moreover, respondent's day planners, even if they be "diaries," *are* in the format of a book, and so the determination whether they are "bound" cannot be divorced from that context.

The Harmonized Commodity Description and Coding System Explanatory Notes ("EN") to Heading 4820, p. 687, which state that "goods of this heading may be bound with materials other than paper (e.g., leather, plastics or textile material) and have reinforcements or fittings of metal, plastics, etc." (Pet. App. 45a) do not definitively state, or even imply, that loose-leaf ring binders make "bound" books. The manifest purpose of this paragraph is make clear that stationary articles of paper or paperboard remain classified in Heading 4820 even if they incorporate other materials.

Customs asserts that there would be a classification anomaly under the pre-1989 tariff classification system if diaries in ring binders and with spiral binding are not deemed "bound." That is not so, but there would be such an anomaly under the current classification system if "bound" means merely "held together." Unbound diaries which do not have their pages held together must be classified in HTSUS 4820.10.40, but that classification treatment is precluded by HTSUS Ch. 48, Note 9. In order to enforce Note 9 without nullifying HTSUS 4820.10.40 vis-a-vis unbound diaries, the term "bound" cannot mean merely "held together."

Finally, Customs' "semantical approach to this issue," *viz.*, "a binder . . . is that which binds pages together in a fixed order. Pages held together in this manner are bound . . ." (Pet. App. 46a), actually undercuts Customs' determination. Inserting pages into a "binder" merely holds them together in a *changeable*, not fixed, order; "binding" pages to make a "bound" book entails fastening them together in a fixed order.

The former connotes a temporary or changeable condition; the latter connotes permanency. The pages of respondent's loose-leaf day planners are held together in a changeable order, not fastened together, or even held together, in a fixed order, and so they are not a "bound" book.

ARGUMENT

I. CUSTOMS' DETERMINATIONS OF THE COMMON MEANING OF TARIFF TERMINOLOGY ARE NOT ENTITLED TO DEFERENCE FROM THE COURTS

Filofax has only a few brief points to make on the First Question Presented: "Whether classification rulings issued by the Customs Service are entitled to deference in determining the proper classification of imported goods?"

1. Petitioner argues that the court of appeals should have accorded *Chevron* deference[4] to a particular Customs "ruling," HQ 955937, Oct. 21, 1994, Pet. App. 28a-47a.[5] Petitioner

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[4] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[5] Petitioner repeatedly characterizes HQ 955937 as a "ruling," and bases its deference arguments largely on statutory and regulatory provisions pertaining to "binding rulings." Petitioner's Brief ("Pet'r Br.") at 19, 23, 27-33, *citing* 19 U.S.C. §§1502(a), 1625(c); 19 C.F.R. § 177.9(a). Binding rulings are issued by Customs Headquarters or, in some instances, individual customs ports, with respect to the customs treatment of prospective importations, based upon facts presented by the concerned importers. *See generally* 19 C.F.R. §§ 177.1-.9. HQ 955937, however, is a "protest review decision" (Pet. App. 28a), which Customs Headquarters issues after "further review" of an administrative protest filed by the importer concerning the customs treatment of its past importations. *See generally* 19 C.F.R. §§ 174.23-.27. To the extent that they are based upon the status and effect

occasionally mentions that *Chevron* deference applies to agencies' reasonable interpretations of "ambiguous terms" in the statutes which they administer. Pet'r Br. at 19-20, 27. Remarkably, however, petitioner does not claim, much less demonstrate, that the tariff terms which Customs interpreted in HQ 955937 -- "diary" and "bound" in HTSUS 4820.10.20 -- are ambiguous, nor did Customs so assert in HQ 955937.[6] Notwithstanding this omission, in order to decide whether petitioner is entitled to the result it seeks, this Court must determine for itself whether those tariff terms are ambiguous, utilizing the well-established rules of statutory construction.[7]

In HQ 955937, when challenged by respondent on its selection of a dictionary definition for "diary," Customs responded: "Reference to lexicographic sources is a means to *ascertain* the commonly accepted definition or definitions, for a word or term. . . . Many words have several definitions and Customs may consider any or all of them when making a classification determination." Pet. App. 33a (emphasis added).[8]

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of binding rulings, petitioner's arguments are inapposite to HQ 955937.

[6] Even if petitioner or Customs had so asserted, *Chevron* does not command the courts to defer to their opinion. Moreover, the mere fact that Customs and respondent disagreed about the meanings of the tariff terms at issue in HQ 955937 does not mean that they are ambiguous; otherwise, an agency could manufacture ambiguity by refusing to accept a clear meaning.

[7] *See Chevron*, 467 U.S. at 843 n.9 ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.").

[8] "To assist it in ascertaining the common meaning of a tariff term, the court may rely upon its own understanding of the terms used, and it may consult lexicographic and scientific authorities, dictionaries, and other reliable information sources." *Lynteq, Inc. v. United States*, 976 F.2d 693, 697 (Fed. Cir. 1992), *quoting Brookside Veneers, Ltd. v. United States*, 847 F.2d 786, 789 (Fed. Cir.), *cert. denied*, 488 U.S. 943 (1988).

Here, unwittingly, Customs explains why petitioner's claim for *Chevron* deference to Customs' interpretations of tariff terminology must fail.

Unlike the statutory constructs, abstractions, and generalizations that characterize classic *Chevron* deference cases,[9] and even customs cases in which the courts have accorded *Chevron* deference to Customs' statutory interpretations,[10] tariff terminology is intrinsically precise

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[9] *See Chevron* ("stationary source" of air pollution); *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251 (1995) ("the business of banking"; "insurance"); *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996) (loan "interest"); *Udall v. Tallman*, 380 U.S. 1 (1965) ("disposition" of land; "public-land laws").

[10] *See United States v. Haggar Apparel Co.*, 526 U.S. 380 (1999) ("operations incidental to the assembly process" in HTSUS 9802.00.80); *National Customs Brokers & Forwarders Ass'n v. United States*, 59 F.3d 1219 (Fed. Cir. 1995)(*Chevron* deference to Customs rule on informal entry of goods); *Chrysler Motors Corp. v. United States*, 755 F. Supp. 388 (Ct. Int'l Trade 1990), *aff'd*, 945 F.2d 1187 (Fed. Cir. 1991) ("operations incidental to the assembly process" in HTSUS 9802.00.80); *Mitsui Foods, Inc. v. United States*, 867 F.2d 1401 (Fed. Cir. 1989) ("United States pack" tuna, for purposes of the tariff rate quota for tuna classifiable in item 112.30, TSUS, does not include tuna packed in American Samoa); *Guess? Inc. v. United States*, 944 F.2d 855 (Fed. Cir. 1991) ("fungible" merchandise for duty drawback purposes); *Generra Sportswear Co. v. United States*, 905 F.2d 377 (Fed. Cir. 1990) ("price actually paid or payable" for imported merchandise under customs valuation law). *Cf. Zenith Radio Corp. v. United States*, 437 U.S. 443 (1978)(pre-*Chevron* deference to Customs interpretation of "bounty or grant" under countervailing duty law);

In *DAL-Tile Corp. v. United States*, 829 F. Supp. 394 (Ct. Int'l Trade 1993), *aff'd*, 26 F.3d 139 (Fed. Cir. 1994), the Court of International Trade noted *Chevron* deference, but found and enforced the plain meaning of the customs liquidation provisions. *Goodman Mfg., L.P. v. United States*, 69

because it denominates tangible articles bought and sold in commerce.[11] Absent a demonstrated commercial meaning or an explicit statutory definition, a tariff term has only one possible meaning -- its common meaning at the time the tariff law was enacted.[12] That common meaning, like the truth about *The X-Files*, "is out there" to be correctly *ascertained* -- it is not to be devised, or selected from a menu of possible interpretations, in the exercise of Customs' administrative discretion implicitly delegated by Congress.

2. *Chevron* deference is for an agency's interpretation of ambiguous terms in its administered statute -- not the agency's application of that interpretation to the facts of the matter. In tariff classification cases, "[w]hile the meaning of a classification term is a question of law, the issue of whether merchandise comes within the definition of a classification term is a question of fact . . . .". *Totes, Inc. v. United States*, 69 F.3d

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F.3d 505 (1995), involved Customs regulations on calculating allowance for recoverable waste, for purposes of valuation of manufactured goods entered from a foreign trade zone. The Federal Circuit acknowledged *Chevron* deference but held that Customs' interpretation was unlawful.).

[11] The courts denied *Chevron* deference to Customs' classification positions in *Rollerblade, Inc. v. United States*, 112 F.3d 481 (Fed. Cir. 1997) ("footwear" under TSUS 700.56, TSUS and HTSUS 6402.19.10); *IKO Industries v. United States*, 105 F.3d 624, 626 (Fed. Cir. 1997) ("articles of asphalt" under HTSUS 6807; "asphalted paper" under HTSUS Ch. 68, Note 1(b)); *Anval Nyby Powder AB v. United States*, 927 F. Supp. 463 (Ct. Int'l Trade 1996) ("unwrought" metals and "manufactured primary forms" of metals under HTSUS Sec. XV, Add'l U.S. Note 2); *Semperit Indus. Prods., Inc. v. United States*, 855 F. Supp. 1292 (Ct. Int'l Trade 1994) ("predominate" textile components in rubber belts in HTSUS 4010.91.15).

[12] *See, e.g., Lynteq*, 976 F.2d at 697; *E.M. Chemicals v United States*, 920 F.2d 910, 913 (Fed. Cir. 1990). Customs employs the same rule of construction. *See, e.g.*, HQ 962328, Aug. 24, 1999; HQ 961974, June 15, 1999.

495, 498 (Fed. Cir. 1995); *E.M. Chemicals v. United States*, 920 F.2d 910 (Fed. Cir. 1990); *Simod America Corp. v. United States*, 872 F.2d 1572, 1576 (Fed. Cir. 1989).

Petitioner asserts that the courts must defer to Customs' tariff classification decisions in their entirety -- both conclusions of law and findings of fact -- if "reasonable" in light of the information before the agency.[13] Affording such deference would mean that tariff classification cases, which may be brought in the Court of International Trade only after Customs' denial of an administrative protest (*see* 19 U.S.C. § 1514(a)), would become reviews of Customs' protest decisions on the agency record. This result would violate 28 U.S.C. § 2640(a)(1), which requires that protest denial cases be tried in the Court of International Trade "on the basis of the record made before the court."

3. Petitioner advances several policy arguments in favor of deference to Customs classification rulings, which do not apply in that context. Deference to Customs classification rulings is not needed in order to ensure that the HTSUS is construed and applied consistently and correctly by a specialized, expert federal agency,[14] rather than piecemeal by general-purpose,

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[13] Pet'r Br. at 20-23, 31 ("the courts below should have deferred to these rulings and upheld them if they 'implement the congressional mandate in some reasonable manner'"), 34-36 ("The Customs Service reasonably interpreted the statutory classification of "bound" "diaries" to include the spiral and ring-bound day planners imported by respondent.").

[14] Customs undoubtedly is expert in navigating the headings and subheadings of the HTSUS, and has unique access to its body of precedential decisions, but it is not necessarily adept at ascertaining the common meaning of tariff terms -- HQ 955937 proves as much. Customs cannot claim any unique qualifications in researching and analyzing lexicographic authorities, nor can it specialize in omniscience about the myriad articles of commerce which it classifies. Customs does have a cadre of "National Commodity Specialists" based in New York, who directly issue numerous routine

regional federal courts. Pet'r Br. at 25-26 n.11. The Court of International Trade and the Court of Appeals for the Federal Circuit are courts of national venue and hear all customs cases. 28 U.S.C. §§ 1292(c)(1), 1295(a)(5), 1581-84.

On the other hand, according deference to Customs rulings will have serious detriments to both Customs and the importing community. Congress' manifest objective in providing for binding rulings in 19 U.S.C. § 1502(a) was to encourage importers to seek Customs' pre-importation guidance on classification and other customs issues; Customs itself encourages importers to seek prospective rulings under the rubric of "informed compliance." Affording deference to Customs rulings will discourage importers from seeking Customs' guidance, since they will know that they will be at a serious disadvantage in challenging Customs' treatment of their importations in court if they have received a pre-importation ruling on the issues.

II. CUSTOMS' DETERMINATION THAT RESPONDENT'S DAY PLANNERS ARE "DIARIES" UNDER HTSUS 4820.10.20 DISREGARDS THE SEPARATE CLASSIFICATION OF ARTICLES "SIMILAR TO DIARIES," IS UNLAWFULLY BASED UPON A BRITISH USAGE OF THE WORD "DIARY," AND IMPROPERLY RELIES UPON COURT PRECEDENT UNDER AN OBSOLETE TARIFF REGIME

1. The first rationale given by Customs in HQ 955937 for

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classification rulings and regularly advise Customs Headquarters personnel on classification matters. They are career Customs officers, however, with little or no hands-on experience or expertise in the manufacture and marketing of the products in which they specialize.

classifying respondent's day planners as "diaries" in HTSUS 4820.10.20 is the supposed weight of Customs' precedent: "[T]his office has consistently determined that articles *similar* in design and/or function to [respondent's day planners] are classifiable as diaries" in HTSUS 4820.10.20 (emphasis added). Pet. App. 31a; Pet'r Br. at 35.[15] At the outset, we find a major legal and logical error in Customs' analysis: If respondent's day planners are "*similar* in design and/or function" to articles previously classified as "diaries" in HTSUS 4810.10.20, then they are properly classified in HTSUS 4820.10.40 as articles *similar* to diaries.

Later, Customs states that, in its various rulings, "Customs held that articles *synonymously* referred to as diaries, planners, agendas, organizers, and engagement books, most of which incorporate the same or similar components as [respondent's day planners] . . ." are "diaries.")(emphasis added). Pet. App. at 32a. Customs cites no extrinsic evidence that these product descriptions are synonymous in the marketplace or in common usage. On the contrary, according to the authoritative lexicographic resource on synonyms, *Roget's International*

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[15] In fact, Customs' position on this classification issue has not been consistent and uniform. As Customs itself explained in HQ 958130, Sept. 12, 1995, a decision issued to Filofax:

> Following the enactment of the HTSUS in 1989, the Area Director of Customs, New York Seaport, issued a number of ruling letters in which merchandise described as organizers, planners, agendas or engagement calendars were not regarded as diaries. At that time, the provision for diaries was reserved for books used as personal journals and suitable for extensive notations or narratives. As the submitted sample was not suitable for these purposes, it was classified as an article similar to a diary.
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> However, these early decisions were superseded by a series of rulings from Customs Headquarters. . . . .

Thesaurus 394-95 (5th ed. 1992), under the general category "**549 RECORD**" and subcategory "11 <record books>," "**calendar**, desk calendar, appointment calendar, appointment schedule, engagement book, agenda" are synonyms, and "**diary**, journal" are synonyms -- but the **calendar** synonyms and **diary** synonyms are not synonymous with each other.

2. The crux of HQ 955937 is Customs' exclusive reliance upon the second definition of "diary" from *The Compact Edition of the Oxford English Dictionary* 321 (1987),[16] which reads in full as follows:[17]

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[16] The *Compact Oxford* is the full *Oxford English Dictionary*, greatly reduced in size to fit into two volumes; normally it must be read with the aid of a magnifying glass. The identical definition of "diary" is found in V OXFORD ENGLISH DICTIONARY 612 (2d ed. 1989). *Oxford English Dictionary* citations in the remainder of this brief are to the full-size version.

[17] The first definition of "diary" in the *Oxford English Dictionary* reads:

> **1.** A daily record of events or transactions, a journal; specifically, a daily record of matters affecting the writer personally, or which come under his personal observation.

In HQ 955937, Customs "note[d] that the narrower definition of 'diary,' as set forth in the Oxford English Dictionary's first definition, connotes an article containing blank pages used to record extensive notations of one's daily activities". Pet. App. 33a. The court of appeals also cited to this definition, and to the first "diary" definitions in two other dictionaries, *i.e.*, *The American Heritage Dictionary of the English Language* 516 (3d ed. 1992) ("**1.** A daily record, especially a personal record of events, experiences, and observations, a journal"), and *Webster's New Twentieth Century Dictionary of the English Language* 504 (2d ed. 1961) ("**1.** A daily record, especially of the writer's own experiences, thoughts, etc."). Pet. App. 12a. In Filofax's view, the first "diary" definition in the *Oxford English Dictionary*, and the "diary" definitions cited by the court of appeals, apply to "diaries" in HTSUS 4820.10.20 only indirectly because they connote a written work rather than a blank book.

> **2.** A book prepared for keeping a daily record, or having spaces with printed dates for daily memoranda and jottings; also applied to calendars containing daily memoranda on matters of importance to people generally to members of a particular profession, occupation, or pursuit.
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> A *diary* in this sense may vary in size from a folio volume, large enough to hold a detailed daily record in sense 1, to a small pocket-book with daily spaces only for the briefest notes, or merely with printed memoranda for daily reference.

On its face, this definition does not speak of a "diary" as being used for noting future engagements; it speaks of "daily" memoranda and jottings,[18] and Customs seems to have made a secondary interpretation of "memoranda and jottings" to encompass future appointments.[19] Other *Oxford* dictionaries, however, define "diary" to include a blank, dated book for noting future engagements,[20] while the *Webster's* and *American*

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[18] The "calendar" portion of the definition describes a printed rather than blank article. Customs does not appear to base HQ 955937 upon this facet of the definition.

[19] The modifying adjective "daily" in this context, however, is defined in V *Oxford English Dictionary* 216 as "done every day." The suggests notations of present rather than future events.

[20] *See, e.g.*, 1 THE NEW SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 669 (4th ed. 1993):

> **1.** A daily record of events, transactions, thoughts, etc., esp. ones involving the writer. **2.** A book in which to keep such a record, usu. having dates printed in it; a book or calendar with daily memoranda, esp. for people with a particular interest; a person's list of forthcoming engagements. . . .

OXFORD AMERICAN DICTIONARY 177 (1980):

Heritage dictionaries do not do so.[21] Even if this difference between the dictionaries could not be resolved or explained, the word "diary" as a tariff term would still have only one possible meaning, *i.e.*, its common meaning, and it would be the responsibility of Customs and the courts to ascertain it. But in this instance, the difference between the dictionaries can be resolved and explained, and the *Webster's/American Heritage* definition clearly is the correct one.

If the common meanings of words are reflected in the everyday language that we read, then common meaning and usage are strongly reflected in the reporting and editorials of the

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1. a daily record of events or thoughts. **2.** a book for this or for noting engagements.

[21] WEBSTER'S NEW WORLD COLLEGE DICTIONARY 399 (4th ed. 2000):

> **1** a daily written record, esp. of the writer's own experiences, thoughts, etc. **2** a book for keeping such a record.

Counsel for Filofax confirmed by telephone on August 13, 2000, with the editors of this dictionary that its third edition, published in 1988, presented the identical definition.

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 625 (1993):

> **1 :** a register or record of events, transactions, or observations kept daily or at frequent intervals : JOURNAL, *esp* : a daily record of personal activities, reflections, or feelings **2 :** a book intended or used for a diary

THE AMERICAN HERITAGE DICTIONARY 516 (3d ed. 1992):

> **1.** A daily record, especially a personal record of events, experiences, and observations; a journal. **2.** A book for use in keeping a personal record, as of experiences.

American print news media. The news media invariably establish standards for uniform style and word usage in their publications. Filofax's research has ascertained that one dictionary -- *Webster's New World College Dictionary* -- is the official authority in word usage for the two major U.S. wire services, a major national financial newspaper, and three of the pre-eminent major U.S. city newspapers.[22] This circumstance alone favors *Webster's* over *Oxford* on general issues of

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[22] LOS ANGELES TIMES STYLE AND USAGE GUIDE 2 (K. Gosnell ed. 1995) ("[T]he Webster's New World Dictionary, Third College Edition, updated 1994 . . . is adopted as The Times primary desk dictionary on the effective date of this book."); THE WASHINGTON POST DESKBOOK ON STYLE 219 (2d ed., T. Lippman ed. 1989) ("The Washington Post's authority on matters of spelling, punctuation and definition is Webster's New World Dictionary of American English (Third Edition), published in 1988."); THE NEW YORK TIMES MANUAL OF STYLE AND USAGE ix (A. Siegal & W. Connolly ed. 1999) ("The authority for spelling any word not found here, and for the word's usage, is the most recent printing of Webster's New World College Dictionary (Macmillan)."); THE ASSOCIATED PRESS STYLEBOOK AND BRIEFING ON MEDIA LAW 73 (N. Goldstein ed. 2000) ("**dictionaries** For spelling, style and usage questions not covered by this stylebook, consult Webster's New World College Dictionary, Fourth Edition, published by IDG Books. . . . . [T]he backup dictionary, with more listings, is Webster's Third New International Dictionary, published by G. & C. Merriam Co. of Springfield, Mass."); UPI STYLEBOOK 84 (3d ed. 1995) ("**dictionaries** For spelling, style and usage questions not covered by this stylebook, consult Webster's New World Dictionary of American English, Third College Edition. . . . . For spelling and usage not covered in this book or in Webster's New World Dictionary, consult Webster's Third International Dictionary, which has more entries."); THE WALL STREET JOURNAL STYLEBOOK 56 (4th ed. 1995) ("**dictionaries** For spelling, style and usage questions not covered by this stylebook, consult Webster's New World Dictionary, Third College Edition.).

Webster's New World College Dictionary is among the lexicographic authorities used by Customs in tariff classification decisions. *See, e.g.*, HQ 961942, Oct. 26, 1999; HQ 961004, May 5, 1999.

common meaning.[23]

On the particular issue of "diary," the difference between the *Webster's* and *Oxford* definitions as regards the notation of appointments does not require us to chose one over the other. Both definitions reflect the common meaning of the word "diary" as a blank book -- *Webster's*, in the United States, and *Oxford*, in Great Britain.[24] That is why Filofax, which still

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[23] In no way does Filofax suggest that *Webster's New World College Dictionary* should be anointed the sole authority on word definitions and usage. As Dr. Samuel Johnson observed, "Dictionaries are like watches, the worst is better than none, and the best cannot be expected to go quite true." 1 J. BOSWELL, THE LIFE OF SAMUEL JOHNSON 293 n.3 (L.F. Powell, ed. 1964).

Nor does Filofax suggest that the *Oxford English Dictionary* is disqualified from use in customs classification matters on account of its British origin. We do suggest, however, that when the *Oxford* dictionary presents a definition of a tariff term at odds with the *Webster's* definition, the possibility of a British-American usage difference must be considered.

[24] Filofax commissioned Dr. Bas Aarts, Director of the Survey of English Usage, University College London, to prepare a report on the differences in meaning of the word "diary" in British and American English. Dr. Aarts concluded:

> British and American English differ markedly in their use of the word *diary*. In BrE this word can mean either a book in which personal events and feelings are recorded, as well as a small booklet in which appointments and future engagements are noted down. AmE uses only the first sense of the word *diary*, and uses *agenda* instead for the second sense. Dictionaries of English (both BrE and AmE) have long recorded this difference of usage. Evidence from several large corpora of British and American English conform these findings.

The text of Dr. Aarts's report has been reformatted and attached as an Appendix to this brief; the above-quoted conclusion is to be found on page 9a. The original, hard-copy of Dr. Aarts' report is available for the Court's inspection upon request.

designs its organizers in Great Britain for world-wide distribution, labels their engagement calendar section a "diary."[25]

For the common meaning of tariff terms, Customs and the courts must look to American usage. *See Two Hundred Chests of Tea*, 9 Wheat. 430, 438 (1824) ("Whether a particular article were designated by one name or another, in the country of its origin . . . was of no importance in the view of the legislature. . . . . It applied its attention to the description of articles as they derived their appellations in our own markets, in our domestic as well as our foreign traffic."); *Norman G. Jensen, Inc. v. United States*, 84 Cust. Ct. 76, 80-81, 490 F. Supp. 497 (1980):

> [I]t is well recognized that in including an article in the tariff schedules, the Congress is deemed to have used the name of such an article in the commercial sense, which, in the absence of evidence to the contrary, shares the same meaning as the common ordinary usage thereof. . . . .The term "postage stamps," . . . throughout the years has been used in the ordinary course of communication and commerce between peoples of this world. If a distinction might exist between a philatelic meaning of the term

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See also BRITSPEAK'S BRITISH-AMERICAN DICTIONARY, http://pages.prodigy.com/NY/NYC/britspeak/ukus2.html (British Word - "Diary"; American Say - "Appointment book.").

[25] The product in *Brooks Bros. v. United States*, 68 Cust. Ct. 91 (1972) was "The Economist Diary -- 1966". The Customs Court opined: "The description or label of "diary" has been properly chosen by those who have brought the article into being and have offered it for sale". 68 Cust. Ct. at 96. *The Economist* is a famous British current-affairs periodical with world-wide circulation; its thematic engagement calendar is denoted a "diary" in accordance with British usage.

> "postage stamps" and general common meaning thereof as used in the nonphilatelic world, it is improbable that the Congress intended the term to have a meaning other than the connotation commonly accepted in the everyday social and business communities of our country.

Standard Oil Co. of New Jersey v. United States, 5 Cust. Ct. 166, 167 (1940) ("We are satisfied that the latter definition represents the common meaning of the term in ordinary usage in the United States.").[26]

Under the American usage principle, the *Webster's* definition of "diary" should apply under HTSUS 4820.10.20; Customs knowingly violated this principle in HQ 955937 by selecting the *Oxford* definition. This is not mere speculation: A year and a half earlier, in HQ 953413, Mar. 29, 1993, Customs explained to another importer that it selected the broader *Oxford* definition of "dairy" because the narrower *Webster's* definition

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[26] *Cf. also National Coalition for Students with Disabilities Education And Legal Defense Fund v. Gilmore*, 152 F.3d 283, 289-90 (1998), *as amended*, 190 F.3d 600 (4th Cir. 1999):

> In fact, the only support for Virginia's argument comes not from American but from British usage of the term "office." . . . Were we interpreting a statute of British origin, this definition might be sufficient to create an ambiguity of meaning. [¶] In this case, however, we are interpreting a statute enacted by the United States Congress, with the constituent states of the Union as the intended audience. The fact that an alternative definition exists in the English language is not enough to create ambiguity. . . . We believe that when the alternative definition of a term derives chiefly from usage outside the United States, the foreign usage will not blur an otherwise plain meaning of the term in one of our statutes, unless there is clear evidence that Congress intended to adopt the foreign definition.

> would place a narrow construction on the interpretation of the nomenclature at the international level. . . . It is indisputable that the [*Oxford English Dictionary*] is recognized internationally as a valid source of reference and that it therefore provides an acceptable definition of the term "diary" for purposes of interpreting the scope of the word as it is used in the Harmonized System.

The Harmonized System nomenclature is the initial six-digit portion of HTSUS provisions that has been adopted at the international level.

To make matters more outrageous, it seems that Customs has no problem recalling and applying the American usage principle when articles other than day planners are involved. In HQ 954022, Aug. 8, 1994, and HQ 952530, June 9, 1994, Customs considered the tariff classification of a long-sleeved T-shirt. Customs found that, under the Harmonized System at the international level, a T-shirt may be either long-sleeved or short-sleeved, but , "[a]s illustrated by numerous dictionaries, the term 'T-shirt' in the United States adheres to a narrower and more specific definition which precludes the long-sleeved version of the same garment." Customs resolved the matter as follows:

> The classification of articles under the HTSUSA is based on a ten digit system. The first four digits of the classification identify each heading and at the six digit level, the subheading is also identified. This six digit level represents the international system of classification. Anything after the six digit level, i.e., the remaining four digits, are used by each country for domestic tariff and statistical subdivisions. . . .
>
> Though the description of "T-shirt" in the . . . EN is inclusive of long close-fitting sleeves, this type of

> long-sleeved garment is commonly recognized as a "T-shirt" in the international community more than in the U.S. market. Accordingly, the classification of this type of garment is modified at the ten digit level to meet the domestic commercial reality. That is to say, this long-sleeved garment with traditional "T-shirt" features is classified as being similar to the traditional short-sleeved "T-shirt" recognized in the U.S.

When considering long-sleeved T-shirts, Customs correctly recognized that classification at the national tariff rate and statistical level (in this instance, for apparel quota purposes) must reflect the common American meaning of a tariff term, notwithstanding a broader meaning of the term at the international level. When considering respondent's day planners and Filofax's organizers, however, Customs eschewed the narrower, American meaning of "diary" reflected in *Webster's* in favor of the broader, international meaning reflected in *Oxford*. This sort of unprincipled agency decisionmaking is unworthy of respect, much less deference.

In sum, based upon the correct and lawful lexicographic authority, *Webster's*, respondent's day planners are the same as diaries in that they are blank books with dated pages, but they differ from diaries in that they are designed and used to note future events, *etc.* rather than to record present events, *etc.* Accordingly, they are "similar" to diaries and are properly classified in HTSUS 4810.10.40. The court of appeals' decision to this effect is correct, and Customs' determination to the contrary in HQ 955937 is erroneous.

3. Filofax believes that the court of appeal was correct in its finding that the Customs Court and Court of International Trade decisions which speak to the issue of diaries under the pre-1989 Tariff Schedules of the United States ("TSUS"), *viz.*, *Fred Baumgarten v. United States*, 49 Cust. Ct. 275 (1962),

Brooks Bros. v. United States, 68 Cust Ct. 91 (1972), and *Charles Scribner's Sons, Inc. v. United States*, 574 F. Supp. 1058 (Ct. Int'l Trade 1983), "supply only limited guidance for this case."[27] Pet. App. 8a-11a.

III. CUSTOMS' DETERMINATION THAT DIARIES IN LOOSE-LEAF RING BINDERS ARE "BOUND" UNDER HTSUS 4820.10.20 IS AN UNLAWFUL, "BACKWARDS" EXERCISE IN TARIFF CLASSIFICATION, REFLECTS AN IMPERMISSIBLE INTERPRETATION OF THE TERM "BOUND," IS ERRONEOUS EVEN UNDER THAT INTERPRETATION, AND IS OTHERWISE INSUPPORTABLE

Turning to the issue of whether respondent's day planners are "bound" under HTSUS 4820.10.20, the court of appeals first determined that, in the context of books, the common meaning of "bound" is "permanently secured or fastened." Then, applying this meaning to the undisputed facts, the court of appeals found that respondent's day planners which utilize a loose-leaf ring binder are not "bound" under HTSUS 4820.10.20. Pet. App. 14a-16a. Petitioner asserts that Customs' contrary determination in HQ 955937 is a "thorough, well-formulated, [and] reasonable interpretation of the Tariff Act," to which the court of appeals should have accorded *Chevron* deference. Pet'r Br. at 35-37. It is nothing of the kind.

As mentioned above, *Chevron* deference generally is accorded permissible agency interpretations of ambiguous or vague terms in the statutes which they administer. Customs' determination that diaries in loose-leaf ring binders are "bound"

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[27] Eighteen years ago, counsel for Filofax on this brief served as counsel for Charles Scribner's Sons in that litigation.

under HTSUS 4820.10.20 is not an "interpretation" *per se* of the HTSUS. Rather, it is -- or is supposed to be -- a conclusion reached by ascertaining the common and commercial meaning of "bound" in HTSUS 4820.10.20, then applying that meaning to the features and functions of a loose-leaf ring binder.[28] In HQ 955937, however, Customs ran the tariff classification process backwards -- first, concluding that loose-leaf ring binders make "bound" diaries under HTSUS 4820.10.20, then, "[l]astly," employing "a semantical approach to the issue" in order to synthesize a compatible definition of "bound," *i.e.*, "held together in a fixed order". Pet. App. 46a. This is not "thorough, well-formulated [or] reasonable" agency decision-making (Pet'r Br. at 36) by any standard. As a matter of tariff classification procedure, it is unlawful.

Putting all this aside, Customs' stated grounds in HQ 955937 for determining that loose-leaf ring binders make "bound" diaries in HTSUS 4820.10.20 (addressed below *seriatim*) are patently unreasonable. More important, Customs' semantically-derived meaning of "bound" is impermissible in the statutory context and actually does not support Customs' determination.

1. Customs finessed respondent's on-point Customs Court precedent[29] and lexicographic authorities on the common and commercial meaning of "bound" in the context of books,

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[28] "Classification of goods entails a two-step process: (1) ascertaining the proper meaning of specific terms in the tariff provision; and (2) determining whether the merchandise in question comes within the description of the properly construed terms." *Hewlett-Packard Co. v. United States*, 189 F.3d 1346, 1348 (Fed. Cir. 1999), *citing Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1391 (Fed. Cir. 1994).

[29] *Kessler & Co. v. United States*, 63 Cust. Ct. 513, C.D. 3944 (1969), *citing Overton & Co. v. United States*, 22 Treas. Dec. 437, T.D. 32,327 (1912).

framing "the issue at hand" in terms of what is a "bound diary," and positing, *ipse dixit*, that "there is no requirement that a diary be in the format of a book". Pet. App. 44a, Pet'r. Br. 35-36.[30] That very requirement, however, is reflected in the *Oxford English Dictionary* definition of "diary" which Customs embraced in the decision ("A book prepared for keeping a daily record, or having spaces with printed dates for daily memoranda and jottings."). Pet. App. 33a.[31] Moreover, respondent's day planners, even if they be "diaries," *are* in the format of a book, and so the determination whether they are "bound" cannot be divorced from that context.

2. Customs grounded its determination that loose-leaf ring binders make a "bound" diary mainly on the Harmonized Commodity Description and Coding System Explanatory Notes ("EN") to Heading 4820, p. 687, "which represent the official interpretation of the HTS at the international level" (*see* Pet'r Br. at 36 n.24), and which state that "goods of this heading may be bound with materials other than paper (e.g., leather, plastics

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[30] Petitioner's complaint that "the court of appeals declined to consider industry usage" in determining the meaning of "bound" (Pet'r Br. at 37 n.25) is odd in light of Customs' insistence in HQ 955937 that the book trade's views on the matter are irrelevant. Pet. App. 44a. In any event, petitioner's complaint is unfounded; the court of appeals relied primarily upon a specialized trade dictionary, THE DICTIONARY OF PUBLISHING 43-44 (1982), for its view of "bound.". Pet. App. 15a.

[31] The second *Oxford English Dictionary* definition of "diary" further mentions "calendars containing daily memoranda on matters of importance to people generally or to members of a particular profession, occupation, or pursuit". Customs appears not to have made any use of this additional definition in HQ 955937, and petitioner's brief does not mention it. *See* Pet'r Br. at 8.

The definition of a blank "diary" in *Webster's New World College Dictionary* requires that it be a book. *See* p. 16 n.21 *supra*.

or textile material) and have reinforcements or fittings of metal, plastics, etc." Pet. App. at 45a. Customs read this provision as making it "clear that the Harmonized System Committee contemplated metal binders as being within this heading's definition of bound articles. . . . In this case, the EN specifically set forth how articles of heading 4820, HTSUSA, may be bound. The EN state that articles of this heading may be bound with metal." *Ibid.*

The EN to Heading 4820 has no definitive statement, or even implication, that loose-leaf ring binders make "bound" books. The materials with which goods of Heading 4820 may be "bound" are those that usually would appear in their exterior covers (paper and leather seem ill-suited for physically connecting sheets of paper). The EN's specification that an article of Heading 4820 may have reinforcements or fittings of metal, *e.g.*, a loose-leaf ring mechanism, or a spring-loaded compression mechanism, inside a paperboard binder cover, does not suggest that putting paper sheets inside such a binder creates a "bound" book. The manifest purpose of this paragraph of the EN to Heading 4820 is not specify the meaning of "bound" -- a pointless exercise, since that term does not appear in Heading 4820 -- but to make clear that stationary articles of paper or paperboard remain classified in Heading 4820 even if they incorporate other materials.

3. Next, Customs looked to *Brooks Bros.*, in which a spiral-bound "Economist Diary" was classified as a bound diary under item 256.56, Tariff Schedules of the United States ("TSUS"), in effect before 1989, as precedent that all diaries with ring binders or spiral binding are "bound" under HTSUS 4820.10.20. Pet. App. 45a. *Brooks Bros.* is not decisional precedent even that spiral bindings make "bound" diaries because no such decision was made; the plaintiff "[did] not dispute that the merchandise . . . consists of bound books". 68 Cust. Ct. at 93-94. Moreover, Filofax understands that none of

respondent's day planners have spiral bindings (and neither do Filofax organizers). Finally, it is illogical to propose that: (a) spiral bindings make "bound" diaries; (b) spiral bindings and ring binders can be made of metal; and therefore (c) ring binders make "bound" diaries.

4. Customs further suggested that, if diaries in ring binders and with spiral binding are not deemed "bound," then there would have been no TSUS provision under which to classify them because all blank books -- whether specifically diaries, notebooks and address books in item 256.56, TSUS, or non-specified "other" blank books under item 256.58, TSUS -- were subject to a superior heading which required that they be "bound". Pet. App. 46a. This is not so; an unbound blank book would always find classification under item 256.90, TSUS, the ultimate basket provision for "articles . . . of paper . . . not specially provided for."

In any event, obviating an anomaly under obsolete law is hardly good reason for creating an anomaly under current law. Customs' semantical interpretation of "bound", diaries, notebooks and address books creates such an anomaly. Under superior heading HTSUS 4820.10, all diaries must find classification in either HTSUS 4820.10.20, if "bound", or in HTSUS 4820.10.40, if not bound. Assuming Customs' view that "bound" diaries in HTSUS 4820.10.20 merely have their pages "held together" (Pet. App. 46a), it follows that unbound diaries, which *must* be classified in HTSUS 4820.10.40, have pages that are not "held together." This necessary classification treatment is precluded, however, by HTSUS Ch. 48, Note 9, which provides: "Heading 4820 does not cover loose sheets or cards, cut to size, whether or not printed, embossed or

perforated."[32]

Accordingly, in order to enforce Note 9 without nullifying HTSUS 4820.10 vis-a-vis unbound diaries, the term "bound" cannot mean merely "held together."[33] The court of appeals was correct that Customs' broad interpretation of "bound" in HTSUS 4820.10.20 is impermissible, though it reached that conclusion by a different route. Pet. App. 15a-16a. This circumstance alone precludes *Chevron* mandatory deference, *Skidmore* persuasive deference,[34] or any degree of acceptance.

5. Finally, Customs took "a semantical approach to this issue," positing that "a binder . . . is that which binds pages together in a fixed order. Pages held together in this manner are bound . . ." Pet. App. 46a.

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[32] At oral argument before the court of appeals, petitioner "argued that a stack of loose-leaf pages could constitute an unbound diary" classifiable in HTSUS 4820.10.40. Pet. App. 15a. That is not Customs' position, however. Filofax imports a wide variety of such "unbound" blank books in the form of packaged inserts for Filofax organizers; these include "diaries" (engagement calendars), notebooks, name/address/telephone books, expense ledgers, etc. In HQ 955516, Apr. 8, 1994, in accordance with HTSUS Ch. 48, Note 9, Customs held that Filofax's packaged organizer inserts are classifiable in HTSUS 4823.51.00, which provides for "other paper, paperboard, cellulose wadding...: other paper and paperboard, of a kind used for writing, printing or other graphic purposes: printed, embossed or perforated..."

[33] In several rulings issued in 1992, Customs held that bound diaries with paperboard backings, designed to be inserted into interior slots or pockets of outer covers (like the pocket part of a law book) are unbound diaries classifiable in HTSUS 4820.10.40. In HQ 953413, Mar. 29, 1993, Customs recognized the error of its ways and reclassified such articles in HTSUS 4820.10.20. The aberrant 1992 rulings were formally modified or revoked in October 1997. *See, e.g.*, HQ 960764, Oct. 7, 1997, *revoking* HQ 950984, Jan. 27, 1992.

[34] *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

In all frankness, Customs should consult a good dictionary before dabbling in semantics. *Webster's New World College Dictionary*, the official dictionary for most of America's print news media (*see* text at note 22 *supra*), presents the following relevant definitions:

binder. . . **2** a thing that binds or holds together; specif., . . . *c)* a detachable cover with rings or clamps for holding sheets of paper together. (page 145)

bind . . . **8** to fasten together the printed pages of (a book) and enclose them within a protective cover. (page 145)

bound . . . **6** provided with a binding or attached cover, as a book. (page 172)

binding . . .**2** a thing that binds, as . . . *d)* the covers and backing of a book. (page 145)

Inserting pages into a "binder" merely holds them together in a *changeable*, not fixed, order; "binding" pages to make a "bound" book entails fastening them together in a fixed order. The former connotes a temporary or changeable condition; the latter connotes permanency.

The pages of respondent's loose-leaf day planners, like those of Filofax loose-leaf organizers, are held together in a changeable order; they can be supplemented, removed and reinserted, or rearranged, all according to the user's desires and needs. They are not fastened together, or even held together, in a fixed order, and so they are not a "bound" book.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A

REPORT

On the differences in meaning of the word *diary* in British and American English

by

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REPORT

On the differences in meaning of the word *diary* in British and American English

Introduction: American English and British English

It is generally known that American English (AmE) and British English (BrE) differ in a number of ways. A minority of these differences are grammatical in nature. Thus, for example, AmE has two past participles of the verb *get* (*got* and *gotten*), whereas BrE only has one (*got*). British English collective nouns agree with both singular and plural verbs, e.g.

The government is/are *in favour of economic sanctions.*

In AmE only the singular verb agreement is acceptable.

The Past Simple Tense in American English has a wider usage than in BrE. For example *Sue just finished her homework* is an acceptable sentence in AmE, but British speakers would prefer the Present Perfect Tense in this context (*She has just finished her homework*).[1]

While these differences are important, the differences in the lexical domain are much more numerous and more subtle. The two languages can express the same concept with different words, e.g. *underground* in BrE is *subway* in AmE, *tin* in BrE is *can* in AmE, *petrol* in BrE is *gas(oline)* in AmE. The same word can mean different things in the two languages. E.g. *public school* in AmE is a school maintained by public funds, whereas in BrE the same word refers to fee paying schools. *Pavement* in BrE is the surface next to the road which

[1] Examples from Randolph Quirk, Sidney Greenbaum, Geoffrey Leech and Jan Svartvik *A Comprehensive Grammar of the English Language* (London: Longman, 1985).

pedestrians walk on. The same word in AmE refers to the surface of the road itself. Some words are more widely used in one variety, while being more restricted in the other variety. E.g. *shop* in AmE is used only to designate a small and specialised store, or a high-class establishment.

We turn now to the specific word *diary* in the two varieties of English.

The lexical item *diary* in British English and American English

The *Oxford English Dictionary* (OED) gives two principal meanings for the word *diary*:

- A daily record of events or transactions, a journal; specifically, a daily record of matters affecting the writer personally, or which come under his personal observations.
- A book prepared for keeping a daily record, or having spaces with printed dates for daily memoranda and jottings; also, applied to calendars containing daily memoranda on matters of importance to people generally, or to members of a particular profession, occupation, or pursuit.

Both meanings have long been established in BrE usage: the first sense was first attested in 1581, the second in 1605.

Although the two meanings are related, the main difference between the two uses of *diary* seems to be the extent to which the diary is meant to be a private document. Thus, in its first meaning the word means a document for private use, where people record past events. The second meaning seems to be more a document used to write down plans for future events. It is less private, and can even belong to a group of people.

The two different usages first recorded by the OED in the late 16th century are preserved in contemporary BrE. The

British *Cobuild Dictionary* confirms the existence of two meanings:

- If you keep a diary, you regularly write down your experiences, thoughts and feelings in a diary. EG *I haven't kept a diary since I was at school.*
- A diary is a book which has a separate space or page for each day of the year. You use a diary to write down your appointments and things you have to do in the future, or to record what happens in you life day by day. EG *He got out his diary and made a note in it.* [2]

American English differs from British English in allowing the word *diary* to be used only in its more restrictive sense to denote a private document, where the author records personal activities, reflections, or feelings. This is the only meaning recorded by Webster's Third Dictionary:

- A register or record of events, transactions, or observations kept daily or at frequent intervals: Journal; esp.: a daily record of personal activities, reflections or feelings; a book intended or used for a diary.

The lexical item *diary* in the Survey of English Usage corpora (BrE) and in the Brown Corpus (AmE)

Dictionaries are mostly based on the knowledge and intuitions of lexicographers. Ever since the emergence of language corpora these intuitions can be tested, and more reliable statements about usage can be made. What are corpora? Corpora are large collections of spoken and written material from particular languages used in linguistic

[2] Examples from the *Cobuild Dictionary* are taken from an extensive corpus of modern BrE.

research by speech technologists and dictionary compilers, amongst others. They are invaluable databases for those who want access to *real* language data to study particular grammatical or lexical issues. This report makes use of the two corpora housed in the Survey of English Usage (SEU) at University College London (UCL), as well of the Brown Corpus of American English. For more information about the SEU, see the last section of this report.

The AmE usage of the word diary with the sense 'private record of activities' is illustrated by the following examples from the Brown Corpus:

- Dr. L. Taylor of Manchester Depot recorded the setting of phone poles in East Dorset and Barnumville in his **diary** for 1906.
- Private Jenkins Lloyd Jones of the Wisconsin Light Artillery wrote in his **diary**: "I strolled among the Alabamans on the right..."
- "That Man in the White House, like some despot of yore, insisted on reading my **diary**, raiding my larder and ransacking my lingerie!"

This meaning is also attested in the corpora at the Survey of English Usage. Here are some examples:

ICE-GB:W2B-010 #45:1[3]
In this form it was said to the architectural historian James Lees-Milne and recorded by him in his **diary** on 6 June 1945.

ICE-GB:W2B-010 #264:1
As for Churchill - well , John Colville, his private secretary, seems to quote a French source in his **diary** for 13 June

[3] The code is the text identifier.

1940 ("some gleam of light at the far end of the tunnel"), and quotes Paul Reynaud , the French PM on 16 June ("the ray of light at the end of the tunnel"), and himself uses it on 31 May 1952, "I think it is more that he [Churchill] cannot see the light at the end of the tunnel".

However, as we have seen, in BrE *diary* can be used to mean 'planner'. Examples from the SEU corpora follow:

S-07-02[4]
<#326> <$B> Yes, hello here we are.
<#327> <$A> Have... did you hear me?
<#328> <$B> Yes, no I didn't. <laughs>
<#329> <$A> It is… did you know that we're going to May Hammond?
<#330> <$B> Yes, I did .
<#331> <$A> You did?
<#332> <$B> Yes.
<#333> <$A> I 'd completely forgotten forgotten.
<#334> <$B> I had it in my **diary.** <laughs>
<#335> <$A> Oh, so did I. <laughs> I didn't look at it. <laughs>
<#336> <$B> I was just thinking what a good thing it is I've got my **diary.** <laughs>
<#337> <$A> <laughs> Well, that's all right then. I'll see you at home.

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[4] Key: 'S-07-02' is the text identifier; '#326' indicates the line number within the text; '<$A, B>' identifies the speakers. All examples in this report are instances of authentic English usage. In the case of spoken English the extracts have been faithfully transcribed, and thus include hesitations, repetitions and other disfluencies characteristic of real speech.

S-09-01
<#283> <$B> I am I am back in London. I'm here, yes, ehm and…
<#284> <$A> Oh, you are? Well, would you like to make a date for lunch?
<#285> <$B> That would be very nice, yes.
<#286> <$A> Got your **diary**?
<#287> <$B> Ehm, no but I can remember most things.
<#288> <$A> Right, looking forward about a month, ehm, how are you placed in the week beginning eh March the third?
<#289> <$B> As far as I know that's all right. Ehm, I teach seminars beginning at two on a Tuesday.
<#290> <$A> Mmm.
<#291> <$B> Now, wait a moment. Is there another one? Some weeks I teach one beginning at... Actually it begins at three on a Thursday, so that's not too bad.
<#292> <$A> What about a Wednesday? Is that good for you?
<#293> <$B> Wednesday is quite a good day, because I don't teach at all on it

S-08-02
<#529> <$B> It's me again, doctor Edgton. I was just going to say, ehm, would it be all right for me to come a little bit earlier tomorrow? I've arranged in fact to have lunch with a friend of mine who lives in Barn Bell and bring her along with me if that's all right.
<#530> <$C> Oh, that's useful isn't it?
<#531> <$B> Yes.
<#532> <$C> Ehm, yes let me just have a little look at my **diary**.
<#533> <$B> OK.
<#534> <$C> Tomorrow is Wednesday Wednesday.
<#535> <$B> Wednesday, Wednesday, yeah.

<#536> <$C> Let me have a little look see. Wednesday… what time do you have in mind?
<#537> <$B> Well, I would have thought between half past two and three.
<#538> <$C> That would be fine.

S-03-07
<#577> <$B> There's still time to plan round that.
<#578> <$A> Mhm.
<#579> <$B> With any luck, what is it, twenty-seven twenty-seventh of July, is it?, they're away.
<#580> <$c> Twenty-eighth they're going, yeah.
<#581> <$B> Twenty-eighth.
<#582> <$c> But we'll be out, ehm, the week of the twentieth as well. You can go and stay elsewhere and I and the kids are going to be out.
<#583> <$B> Let me just check the **diary**. Yes, <laughs> Jen actually sent you this letter only she hadn't quite mastered the word processor and…
<#584> <$A> <laughs>
<#585> <$B> <laughs>
<#586> <$A> Well, she actually was able to program the word processor to to say that she hadn't mastered it as far as I remember.

All these examples very clearly illustrate the British English usage of *diary* in the sense of 'planner'.

British English also makes use of the idiomatic expression 'get one's diary out'. A teacher might say this to her students at the end of a class to arrange a time for the next class. Naturally, this sense is confined to the meaning of the word *diary* meaning 'planner'.

Conclusion

British and American English differ markedly in their use of the word *diary*. In BrE this word can mean either a book in which personal events and feelings are recorded, as well as a small booklet in which appointments and future engagements are noted down. AmE uses only the first sense of the word *diary*, and uses *agenda* instead for the second sense. Dictionaries of English (both BrE and AmE) have long recorded this difference of usage. Evidence from several large corpora of British and American English confirms these findings.

About the Survey of English Usage

The Survey of English Usage (SEU) is an English Language research centre established by Professor the Lord Randolph Quirk in 1959. It is an internationally recognised and highly regarded centre of excellence for research in the area of English Language and Linguistics. It is housed in the Department of English Language and Literature at University College London (UCL), one of only two departments in the UK to be awarded top research ratings. Along with Oxford it was judged the best English Department in the UK in the *Times Good Universities Guide*. The SEU is especially well known for its work on contemporary grammar: the authors of the standard grammar of the English Language (*The Comprehensive Grammar of the English Language*, 1985, by Randolph Quirk, Sidney Greenbaum, Geoffrey Leech and Jan Svartvik) all have links with the Survey, and two are former directors. The Survey is also known for its pioneering work in the area of corpus linguistics. A great number of linguists have carried out research there, and have based their publications on material derived from the two language corpora produced at the SEU: the *Survey of English Usage Corpus* and the *International Corpus of English*. Also based at the Survey is the Cambridge University Press journal *English Language and Linguistics*. Distinguished previous

Directors are Professor The Lord Quirk and the late Professor Sidney Greenbaum. Dr. Bas Aarts is the current Director.

Over the years the Survey has been involved in pure research into the structure and usage of the English Language. The SEU has a proven track record in attracting external funding and in project management. A number of these projects were funded by the Higher Education Funding Councils, others by private organisations. We list the most important funding bodies below:

- The Economic and Social Research Council
- The Economic and Physical Sciences Research Council
- The Joints Informations Systems Committee
- The Leverhulme Trust
- The Sasakawa Foundation
- The Arts and Humanities Research Board
- The British Academy

The British component of the *International Corpus of English* (ICE-GB) mentioned above is a one-million word corpus which has been fully grammatically tagged and parsed. To search the corpus the SEU has constructed sophisticated and innovative software, the *ICE Corpus Utility Programme* (ICECUP). ICE-GB is rapidly becoming one of the standard resources for research into the English language. For more details, see the ICE-GB website at http://www.ucl.ac.uk/english-usage/ice-gb/index.htm.

For more information on the Survey of English Usage in general, including past projects, please visit our website at http://www/ucl.ac.uk/english-usage.

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7 August 2000

Supreme Court, U.S.
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No. 99-1434

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

THE MEAD CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF *AMICUS CURIAE* THE CUSTOMS AND INTERNATIONAL TRADE BAR ASSOCIATION IN SUPPORT OF RESPONDENT

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BRIEF OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37.3(a) on written consent of all parties, the Customs and International Trade Bar Association (CITBA) respectfully submits this brief *amicus curiae* in support of respondent The Mead Corporation's (Mead) brief.[1]

INTERESTS OF *AMICUS CURIAE*

CITBA, organized in 1919, is a national professional association of lawyers who practice customs and international trade law before federal courts and agencies with jurisdiction over such matters. This brief reflects the judgment of CITBA members reached in the exercise of their profession and is offered solely to assist in improving our legal system.

CITBA participated in this case as *amicus curiae* on appeal before the U.S. Court of Appeals for the Federal Circuit, and before this Court on consideration of the petition for a writ of certiorari. CITBA also appeared as *amicus curiae* before this Court in 1998 in *United States v. Haggar Apparel Co.*, 526 U.S. 380, 119 S. Ct. 1392 (1999), a case presenting similar issues.

STATEMENT

At issue in this case is whether the courts must apply the framework established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), for determining whether an agency interpretation is entitled to deference, to ordinary Customs classification rulings.

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1. Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part. Further, no person or entity other than CITBA, its members, and its counsel made a monetary contribution to the preparation or submission of this brief.

Customs renders classification decisions in numerous formats. Under 19 C.F.R. Part 177, Customs may, in response to a request from an importer or other interested party, issue classification rulings with respect to goods that have not yet been imported, or provide internal advice at the request of a field office regarding goods that have already been imported. Pursuant to 19 C.F.R. Part 174, Customs field officers decide administrative protests of classification determinations made with respect to goods entered at the port. 19 C.F.R. Part 174 also authorizes attorneys in the Office of Regulations and Rulings (OR&R) at Headquarters to issue written decisions on applications for further review of such protests decided by officials at the port of entry. Pursuant to 19 U.S.C. § 1625,[2] Customs may also revoke or modify rulings it has already issued, as Customs did in this case.

Most classification decisions are informal letter rulings, issued to one person, applying the law to a set of facts described in a ruling request. The law applied is the Harmonized Tariff Schedule of the United States (HTSUS) and the issue is whether the scope of a particular tariff subheading encompasses a specific good. Most classification rulings do not set forth detailed, reasoned expositions of the law on a particular matter. They may be issued by a variety of Customs officials with varying levels of expertise and experience at port locations and at the Headquarters level, are rarely subject to notice-and-comment procedures,[3] and if issued with respect to the prospective

2. The U.S. Court of International Trade held in *American Bayridge Corp. v. United States*, 35 F. Supp. 2d 922 (C.I.T. 1998), that the current Customs regulations implementing 19 U.S.C. § 1625, *see* 19 C.F.R. § 177.9(c), are contrary to the plain meaning of the statute as amended by § 623 of the North American Free Trade Agreement Implementation Act, Pub. L. 103-182 (1993).

3. Although certain Customs classification rulings that have the effect of changing an established practice are subject to notice-and-comment procedures and publication in the *Federal Register*, *see* 19 C.F.R. § 177.10(c), the court of appeals expressed no opinion on such rulings. *The Mead Corp. v. United States*, 185 F.3d 1304, 1307 n.1 (Fed. Cir. 1999); Pet. App. 6a.

importation of goods, are not subject to direct judicial review absent a showing of irreparable harm. *See* 28 U.S.C. § 1581(h). Although Customs disseminates some rulings to the public through its web-site, Lexis and Westlaw, not all rulings are published reliably in an official government publication.

SUMMARY OF ARGUMENTS

Customs classification rulings are not authoritative agency interpretations. Such rulings can be issued by Customs officers at any one of over 300 ports. Customs issues over ten thousand letter rulings each year, and sometimes provides conflicting advice with respect to similar goods, as it did in this case. In addition, Customs revokes or modifies a significant number of its rulings each year. Often, as occurred in this case, such modifications and revocations are made without any explanation of why the previous classification was in error, or why the new classification is more appropriate. Few Customs classification decisions are subject to notice-and-comment procedures.

Customs classification decisions are interpretive rulings or informal adjudications lacking the force of law. It is a well established principle of administrative law that only agency pronouncements having the force of law may be given controlling-weight deference under *Chevron*. Accordingly, the court of appeals correctly determined that Customs classification rulings are not entitled to controlling-weight deference under the framework established in *Chevron*. The court of appeals' decision is consistent with previous decisions of this Court, including the Court's decisions in *Haggar*, 526 U.S. 380, and *Christensen v. Harris County*, __ U.S. __, 120 S. Ct. 1655 (2000). In *Haggar*, this Court held that the legal framework established in *Chevron* applies to Customs regulations promulgated in accordance with notice-and-comment procedures. *Haggar*, 526 U.S. at __, 119 S. Ct. at 1400. In *Christensen*, this Court made clear

that informal opinion letters, like interpretations contained in policy statements, agency manuals and other documents lacking the force of law, do not warrant *Chevron* deference. *Christensen*, __ U.S. at __, 120 S. Ct. at 1662.

Furthermore, according controlling-weight deference to Customs classification rulings would undermine *de novo* review of such rulings. Customs classification rulings involve mixed questions of fact and law that cannot be easily separated. Therefore, it would be extremely difficult for the courts to review the factual elements of a ruling *de novo*, while according controlling-weight *Chevron* deference to the portions dealing with statutory interpretation. The statutory presumption of correctness that Customs classification decisions enjoy is more suitable for evaluating these decisions involving mixed questions of law and fact.

Amicus curiae respectfully urges this Court to affirm the decision of the United States Court of Appeals for the Federal Circuit.

ARGUMENTS

I. THE SHEER NUMBER AND VARIETY OF CUSTOMS CLASSIFICATION RULINGS INDICATE THAT THEY ARE NOT AUTHORITATIVE AGENCY INTERPRETATIONS THAT SHOULD LEGALLY BIND THE PUBLIC AND THE COURTS

Pursuant to the Congressional delegation of authority contained in 19 U.S.C. § 1502(a), to prescribe regulations "establishing procedures for the issuance of binding rulings," Customs has promulgated regulations which govern the issuance of tariff classification rulings. 19 C.F.R. Part 177. Under the Customs regulations and the relevant statutes in effect at all times pertinent to this action, any importer may request an advance classification ruling from Customs in regard to a prospective importation. 19 C.F.R. §§ 177.1(a),

(c). Such rulings are commonly referred to as pre-importation rulings.

In addition, the Office of Regulations and Rulings ("OR&R") at Customs Headquarters provides Customs field offices with "[a]dvice or guidance as to the interpretation or proper application of the Customs and related laws with respect to a specific customs transaction." 19 C.F.R. § 177.11(a). Such internal advice may address the proper classification of imported merchandise.

Customs also rules on protests of Customs' classification decisions. 19 U.S.C. § 1514; 19 C.F.R. Part 174. Protests are filed at the port of entry where the decision being protested was made. 19 C.F.R. § 174.12(d). The port director or designated personnel allow or deny the protest. 19 C.F.R. § 174.29. A protest may be filed and decided at any of over 300 ports of entry. 19 C.F.R. § 101.3(b)(1). A protesting party may also seek further review of a protest by OR&R at Customs Headquarters, under certain circumstances. 19 C.F.R. §§ 174.23-27.

As can be seen, Customs classification rulings are issued at different administrative levels and by many different offices across the country. By far the most numerous are pre-importation classification rulings which are issued by attorneys in OR&R at Customs Headquarters, by the National Import Specialists of the National Commodity Specialist Division at the port of New York, and by Field National Import Specialists located at the 46 service ports located throughout the United States. 19 C.F.R. § 177.2(a); 19 C.F.R. § 101.3(b)(2).

The National Import Specialists of the Commodity Specialist Division are organizationally a part of OR&R. *See* Treasury Advisory Committee on the Commercial

Operations of the United States Customs Service, Report of the COAC Subcommittee on OR&R (Jan. 26, 2000) ("COAC Report"), Exhibit 2,[4] App., *infra*, 16a. When issuing classification rulings, the Field National Import Specialists located at the 46 service ports work under the direction of the National Import Specialists in New York. Rulings drafted by the Field National Import Specialists are signed by the service port directors. The personnel located at the over 300 ports of entry who rule on tariff classifications during the course of granting or denying protests are not part of OR&R. They are part of the separate Office of Field Operations.

The OR&R attorneys at Customs Headquarters issued 1,328 rulings during the period from July 1998 to June 1999. COAC Report, Exhibit 3, App. 20a. Of these 1,328 rulings, 912 were classification rulings.[5] COAC Report, Exhibit 3, App. 21a. In contrast, the National Import Specialists of the National Commodity Specialist Division located at the port of New York and the Field National Import Specialists located at the 46 service ports issued 11,229 rulings from July 1998 to June 1999. COAC Report, Exhibit 3, App. 20a. Of these 11,229 rulings, 10,986 were classification rulings. COAC Report, Exhibit 3, App. 22a. There are no publicly available data on the percentage of these 11,229 rulings that were issued by the Field National Import Specialists and signed by the service port directors.

In sum, Customs issued a total of 11,898 classification rulings from July 1998 to June 1999, over 92 percent (10,986) of which were issued by the National Commodity Specialist

4. The COAC Report represents the only publicly available source of data known to *amicus* that details the offices at Customs which issue classification rulings and provides some measure of the number of such rulings issued within a specific time frame.

5. During the period from July 1998 to June 1999, OR&R modified or revoked 165 rulings. COAC Report, Exhibit 3, App. 20a.

Division at the port of New York or by the Field National Import Specialists at the service ports.[6]

The degree of legal analysis in a classification ruling can range from extensive in the case of some rulings issued by the OR&R attorneys at Customs Headquarters, to non-existent for virtually all rulings issued by the National Import Specialists and Field National Import Specialists. *Compare* NY Ruling Letter 864206, 1991 U.S. Custom NY LEXIS 344 (June 19, 1991), *with* HQ Ruling Letter 955937, 1994 U.S. Custom NY LEXIS 925 (Oct. 21, 1994).

Classification rulings issued by the National Import Specialists constitute the overwhelming majority of classification rulings issued by Customs. Almost always they contain only a description of the merchandise at issue and a statement of the tariff provision within which Customs classifies the merchandise. In almost every instance, these rulings contain absolutely no legal analysis or other explanation for the position taken by Customs in classifying the merchandise at issue. *See, e.g.*, NY Ruling Letter 864206, 1991 U.S. Custom NY LEXIS 344 (June 19, 1991).

6. No publicly available data reveals the number of protests challenging Customs classification decisions that were ruled on by the ports of entry. However, the COAC Report indicates that OR&R at Customs Headquarters issued 318 rulings in response to importers' applications for further review (AFR) of protests from July 1998 to June 1999. COAC Report, Exhibit 3, App. 21a. In addition, the COAC Report indicates that OR&R issued 71 memoranda of internal advice (IA) to field offices from July 1998 to June 1999. *Id.* Although the 318 rulings on requests for further review and the 71 memoranda of internal advice are included in the 1328 total rulings issued by OR&R from July 1998 to June 1999, it is unknown how many of these rulings on requests for further review and internal advice memoranda dealt with classification issues.

Pre-importation rulings are binding on Customs with respect to the specific transaction ruled on, not on the public, the courts, or the agency generally. 19 C.F.R. § 177.9(a) (pre-importation rulings are binding on Customs Service personnel); *cf.* 19 C.F.R. § 177.1(b) (oral opinions or advice by Customs officials are not binding on the agency). Thus, "binding" means that the an importer is afforded certainty regarding how Customs will treat an importation administratively. The importer, nonetheless, retains the right to challenge the agency's action by filing an administrative protest. In addition, a Customs field officer who disagrees with a pre-importation ruling may request that it be modified or revoked. 19 C.F.R. § 177.9(b)(1).

Congress, concerned by the lack of uniformity in Customs' classification rulings (*i.e,* ruling that the same goods were classified under different tariff provisions), added a statutory provision directing Customs to issue regulations to establish a procedure for ensuring uniformity in decisions regarding classification "with respect to the same, or substantially similar merchandise." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7361(c), 102 Stat. 4181, 4474-75 (1988) (codified at 19 U.S.C. § 1514 Note). Pursuant to this mandate, Customs promulgated 19 C.F.R. § 177.12, which sets forth procedures for dealing with inconsistent rulings.

Classification rulings remain in effect unless modified or revoked. 19 C.F.R. § 177.9(a). Classification rulings are subject to modification or revocation if "found to be in error or no longer in accordance with the current views of the Customs Service." 19 C.F.R. § 177.10(b). Tens of thousands of classification ruling letters are currently in effect.

This Court stated in *Chevron*, 467 U.S. at 844, that when "the legislative delegation to an agency on a particular question is implicit rather than explicit . . . a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." Among the considerations listed by the Court in determining the reasonableness of agency action is that "the agency considered the matter in a detailed and reasoned fashion." *Id.* at 865. Even when the Court finds "an express delegation of authority to [an] agency to elucidate a specific provision of the statute by regulation . . . [s]uch legislative regulations are given controlling weight unless they are arbitrary, capricious, or otherwise manifestly contrary to the statute." *Id.* at 844.

Therefore, implicit in the grant of *Chevron* controlling-weight deference to an agency's interpretation of a statute is the understanding that the agency has provided a "detailed and reasoned" explanation for its interpretation. Absent a "detailed and reasoned" explanation for an agency's interpretation, the courts cannot determine if the agency's interpretation is either "arbitrary, capricious, or otherwise manifestly contrary to the statute" or, at a minimum, "a reasonable interpretation made by the administrator of an agency."[7] *Id.* at 844; *see also Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962) (an agency must present a "rational connection between the facts found and the choice made").

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7. Nor can an agency provide the court with a "detailed and reasoned" explanation for its actions once those actions have been challenged in litigation as "[t]he courts may not accept appellate counsel's post hoc rationalizations for agency action." *Investment Co. Institute v. Cams*, 401 U.S. 617, 628 (1971) (quoting *Burlington Truck Lines v United States*, 371 U. S. 156, 168-69 (1962)).

The overwhelming majority of classification rulings issued by Customs contain no "detailed and reasoned" explanation for the classification decision.

In a situation in which an agency issues well over 10,000 classification rulings per year from over 300 different offices, in a number of different formats, the overwhelming majority of which contain absolutely no legal analysis or other "detailed and reasoned" explanation for the statutory interpretation asserted by the agency, that are binding only on the agency, such rulings simply do not meet the standard necessary to be accorded controlling-weight deference by the courts.

II. CUSTOMS' CLASSIFICATION RULINGS ARE INTERPRETIVE RULES OR INFORMAL ADJUDICATIONS THAT LACK THE FORCE OF LAW AND THEREFORE ARE NOT ENTITLED TO *CHEVRON* DEFERENCE

Contrary to the petitioner's assertion, Congress has not authorized Customs "to adopt such 'binding rulings prior to the entry of the merchandise' as may be 'necessary to secure a just, impartial, and uniform appraisement of imported merchandise and the classification and assessment of duties thereon.' " Pet. Brief at 19. Rather, Congress authorized the agency to

> establish and promulgate such rules and regulations not inconsistent with the law (*including* ***regulations establishing procedures*** *for the issuance of binding rulings prior to the entry of the merchandise concerned*), and may disseminate such information as may be necessary to secure a just, impartial, and uniform appraisement of imported merchandise and the classification and assessment of duties thereon at the various ports of entry.

19 U.S.C. § 1502(a) (emphasis added). Although Congress contemplated and sanctioned Customs' existing practice of issuing administrative rulings when it amended 19 U.S.C. § 1502(a) in 1993 to include the parenthetical language relating to binding rulings, *see* North American Free Trade Agreement Implementation Act, § 640, Pub. L. 103-182, 107 Stat. 2057, 2203-04 (1993), there is no suggestion that Congress intended such rulings to have the force of law.

In fact, the legislative history of the parenthetical language in § 1502(a) confirms that Congress did not intend for Customs rulings to have the force of law. The report of the House of Representatives Committee on Ways and Means states that the intent of this language was to "provide greater certainty to importers through the binding rulings program while also permitting Customs to accelerate the entry process." H.R. Rept. 103-361, Pt. 1, 138 (Nov. 15, 1993). Customs had been issuing rulings for years when Congress passed the Customs Modernization Act, and the courts had never viewed such rulings as having the force of law or being entitled to controlling-weight deference under *Chevron*. If Congress had intended to mandate a change so sweeping as to give Customs rulings the force of law, it certainly would have stated so in the statute or in the legislative history. *See Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 521 (1989) (a "party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change").

To the contrary, Congress at the same time amended 19 U.S.C. § 1625 to provide for procedures relating to the publication, modification, and revocation of a variety of Customs rulings, including ruling letters and internal advice

memoranda, which it collectively referred to as "interpretive rulings." *See* North American Free Trade Agreement Implementation Act § 623, Pub. L. 103-182, 107 Stat. 2057, 2186 (1993). Interpretive rulings interpret and explain pre-existing legislative acts of Congress, but are not legislative acts themselves because they do not impose new duties or obligations. Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like — Should Federal Agencies Use Them to Bind the Public?*, 41 Duke L.J. 1311, 1313-1315 (1992) (hereinafter "*Interpretive Rules*"); Richard J. Pierce, Jr., *et al.*, *Administrative Law and Process* 308 (3d ed. 1999) ("An interpretive rule interprets or clarifies the nature of the duties previously created by passage of a statute or promulgation of a legislative rule"). Although an agency may, as a practical matter, make interpretive rulings "binding" on private parties by threatening enforcement action if the rulings are not complied with, or by treating the interpretation as dispositive of a matter before the agency,[8] as a legal matter interpretive rules are not binding on the public or the courts. As stated by Professor Anthony:

> The agency treats the interpretation as dispositive of the question involved, and private parties can ignore it only at their peril. The private parties are thus bound practically even though the nonlegislatively promulgated interpretation does not legally bind them: An agency interpretation does not bind the courts and does not of its own force bind the public unless it has been embodied in a legislative rule or other action *carrying the force of law*, as a court is free to arrive at a different interpretation.

8. Customs attempts to make its classification rulings binding on the public in precisely this manner even though its regulations provide that the rulings are only binding on *Customs Service personnel*. 19 C.F.R. § 177.9(a) (emphasis added). Customs' own regulation is an implicit recognition that its interpretive rulings do not have the force of law and cannot bind the public or the courts.

Robert A. Anthony, *Interpretive Rules*, 41 Duke L.J. at 1314 n.6 (1992) (collecting cases) (emphasis added).

In referring to letter rulings and internal advice memoranda as "interpretive rulings" when it amended 19 U.S.C. § 1625 in 1993, Congress is presumed to have understood the long-standing principle that interpretive rules do not bind the public or the courts, and do not have the force of law. Furthermore, since interpretive rulings as defined by Congress under the Administrative Procedure Act cannot have any binding effect on courts or on members of the public, it follows that Congress did not intend to delegate authority to Customs to make policy decisions that bind judges and citizens through use of interpretive rulings. *See generally* Kenneth C. Davis and Richard J. Pierce, Jr., *Administrative Law Treatise* § 3.5, at 120 (3d ed. 1994).

In authorizing Customs to issue *regulations establishing procedures* for the issuance of binding rulings prior to the importation of merchandise, Congress in no way suggested that such rulings themselves should have the force of law. There is nothing unusual about Congress authorizing Customs to promulgate regulations with the force of law relating to procedures for issuing rulings, while providing that the rulings themselves should be viewed as interpretive rulings without the force of law. The regulations define under what circumstances the agency will issue an interpretive ruling and the minimum information the agency needs to formulate an opinion with respect to various customs matters. Such procedural matters, if provided for in regulations promulgated using notice-and-comment procedures, have the force of law and are entitled to *Chevron* deference. It simply does not follow that the opinions expressed in the rulings are of the same stature.

None of the various formats in which Customs issues classification rulings has the force of law except legislative rules promulgated in accordance with notice-and-comment procedures, with publication in the *Federal Register*. The pre-importation rulings Customs issues pursuant to 19 C.F.R. Part 177 are interpretive rulings, as are requests for internal advice, while decisions on applications for further review by Headquarters of protests decisions made by port directors, pursuant to 19 C.F.R. § 174.25, can be characterized as informal adjudications.

Customs classification rulings lack the force of law and therefore are not entitled to controlling-weight deference under *Chevron*. "Interpretations such as those in opinion letters–like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law–do not warrant *Chevron*-style deference." *Christensen*, __ U.S. at __, 120 S. Ct. at 1662. This is the clear pronouncement of the Court that petitioner seeks to avoid. Such informal interpretations are not subject to the rigors of the Administrative Procedure Act and therefore do not have the force of law and are not entitled to *Chevron* deference. *See Reno v. Koray*, 515 U.S. 50, 61 (1995). "The Administrative Procedure Act was adopted to provide, *inter alia*, that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished ad hoc determinations." *Morton v. Ruiz*, 415 U.S. 199, 232 (1974) (citing legislative history).

Thus, while Customs' regulations at 19 C.F.R. Part 177, relating to the agency's general ruling procedures, have the force of law and are entitled to *Chevron* deference, the rulings issued pursuant to those regulations do not have the force of law and are not entitled to such deference.

III. ACCORDING CONTROLLING-WEIGHT DEFERENCE TO CUSTOMS CLASSIFICATION RULINGS WOULD UNDERMINE *DE NOVO* REVIEW OF SUCH DECISIONS

Protests of Customs' classification decisions, which apply the law to the facts, are subject to *de novo* review in the courts. 28 U.S.C. § 2640(a). Because classification rulings involve mixed issues of fact and law, according such rulings controlling-weight deference under *Chevron* would effectively eliminate *de novo* review for the factual aspects of the rulings.[9] While construction of the terms of a tariff provision is a question of law, full analysis thereof often requires the evaluation of evidence as to the common and commercial meaning of the tariff term at issue, since it is well settled that tariffs are written in the language of commerce. For example, in order to establish the "chief use" of imported goods, positive testimony must be considered. *United States v. The Baltimore & Ohio R.R. Co.*, 47 C.C.P.A. 1, C.A.D. 719 (1959); *Advance Solvents & Chemical Corp. v. United States*, 34 C.C.P.A. 148, C.A.D. 358 (1947).

Requiring the courts to parse the rulings to determine which portions were based on legal interpretations and which on factual determinations would be exceedingly difficult, if not impossible. In contrast, Customs regulations relating to classification, such as the regulation at issue in *Haggar,* are general pronouncements regarding how Customs construes the law, but do not involve the application of the law to specific facts. Congress created a specialized court — originally the Board of General Appraisers, then the Customs Court, and currently the Court of International Trade — to review classification decisions *de novo*. To preserve the

9. As noted above, many rulings issued by the National Import Specialist Division in New York lack any statutory construction to which to accord *Chevron* deference.

Congressionally-mandated standard of review applicable to Customs classification rulings requires that such rulings not be accorded controlling-weight deference under *Chevron*.

The *de novo* standard of review for Customs protest decisions contrasts with the standard for judicial review of antidumping and countervailing duty determinations, which is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B). The legislative history of the Trade Agreements Act of 1979 indicates that Congress established a more deferential standard of review for antidumping and countervailing duty determinations because it had entrusted the decision-making authority for complex economic matters relating to subsidies and dumping to the administrative agencies, *i.e.*, the Department of Commerce's International Trade Administration and the International Trade Commission. S. Rep. No. 249, 96th Cong., 1st Sess., at 251-52 (1979), reprinted in 1979 U.S.C.C.A.N. 381, 637-38. The interpretation of the antidumping and countervailing duty laws requires ample policy judgment by the responsible agencies to assure that the laws are administered in a manner that achieves the underlying Congressional intent of remedying the complex unfair trade practices of dumping and subsidization. In contrast, classification decisions are based on the essentially ministerial function of applying revenue-neutral statutory interpretive rules objectively and impartially.

Given the different standards of review applicable to antidumping/countervailing determinations and tariff classification decisions, and the legislative history applicable to each, the Government's citation to cases such as *Zenith Radio Corp. v. United States*, 437 U.S. 443 (1978), is inapposite. *Zenith* involved judicial review of the agency's interpretation of the terms "bounty" and "grant" within the

meaning of the countervailing duty statute. It does not follow that the same level of deference is appropriate with respect to tariff classification decisions involving the application of the law to the facts.

IV. WHILE NOT ENTITLED TO *CHEVRON* DEFERENCE, CUSTOMS CLASSIFICATION RULINGS ARE PRESUMED CORRECT AND MAY DESERVE RESPECT UNDER *SKIDMORE*

Customs rulings enjoy a statutory presumption of correctness. Pursuant to 28 U.S.C. § 2639(a)(1), "the decision of the Secretary of the Treasury . . . is presumed to be correct." That is, the burden is on the importer to prove that the Customs classification decision is incorrect. *See, e.g., Jarvis Clark v. United States*, 733 F.2d 873, 876-78 (Fed. Cir. 1984), *reh'g denied*, 739 F.2d 628 (1984). Although a presumption of correctness and judicial deference are not synonymous, the practical effect of the statutory presumption is that in determining the correct tariff classification of a good, the courts do examine the persuasiveness of the agency's reasoning as expressed in a ruling. The effect of applying the presumption of correctness to such decisions is similar to according them a form of deference, but the presumption of correctness is more suitable for evaluating classification decisions because such decisions involve mixed questions of law and fact.

A majority of this Court ruled in *Christensen* that while interpretive rulings do not warrant *Chevron*-style deference, they are entitled to respect to the extent they persuade the courts by the power of their reasoning. __ U.S. at __, 120 S. Ct. at 1663. Some Customs classification rulings may be entitled to respect under the principles announced in *Skidmore v. Swift*, 323 U.S. 134 (1944). There, this Court held that interpretive rulings, while not controlling upon the

courts by reason of their legal authority, do constitute a body of experience and informed judgment to which courts and the public may properly resort for guidance. *Skidmore*, 323 U.S. at 140. The respect to be accorded such informal interpretations depends on the thoroughness evident in their consideration, the validity of their reasoning, their consistency with earlier and later pronouncements, and all those facts which give such rulings the power to persuade, although lacking power to control. *Skidmore*, 323 U.S at 140.

In customs jurisprudence, the courts have traditionally accorded a *Skidmore*-like respect by evaluating the persuasiveness of the agency's interpretation on a case-by-case basis to assist the court in reaching an independent interpretation of tariff provisions. *See, e.g., Rapken & Co. v. United States*, 25 C.C.P.A. 268, 273, T.D. 49393 (1938) ("long-continued administrative practice may aid in the interpretation of tariff statutes, but it does not preclude the courts from construing or interpreting a statute contrary to such practice . . ."). Some Headquarters rulings contain fairly extensive reasoning and discussion of the tariff classification principles applied to reach the determination expressed therein. However, many classification rulings, particularly those issued by the National Commodity Specialist Division in New York, are one-page classification pronouncements, with little or no analysis. In addition, Customs frequently modifies or revokes its own classification decisions, without explaining or justifying its change in practice. Certainly, the existence of conflicting rulings is a factor to be considered in assessing the persuasive value of a Customs ruling.

For example, contrary to petitioner's assertion on page 17 of its brief on the merits, Customs has not consistently determined that articles similar in design and/or function to Mead's daily planners are classified under subheading

4820.10.20. In 1991, Customs issued ruling letter NY 864206, 1991 U.S. Custom NY LEXIS 344 (June 19, 1991), to Mead's attorneys, advising that the daily planners were properly classified under subheading 4820.10.40. Less than two years later, in ruling letter HQ 953126, 1993 U.S. Custom HQ LEXIS 170 (Jan. 11, 1993), Customs stated: "After further review, concerning the classification of daily planners or multi-function loose-leaf binders, Customs has modified its position on the classification." This latter ruling contains no explanation underlying this change in Customs' position. While Customs sets forth its new position, it did not explain why the previous NY ruling letter was in error, what factors led the agency to change its position, or why the new agency position was more consistent with the statutory language of the competing tariff subheadings. Furthermore, HQ 953126 refers to ruling letter HQ 089960, 1992 U.S. Customs HQ LEXIS 61 (Feb. 10, 1992), in which Customs had ruled that loose-leaf pocket agendas were classifiable under subheading 4820.10.20. Since Customs did not revoke NY 864206 until 1993, this reference to HQ 089960 reveals that two valid Customs rulings existed simultaneously in 1992, providing for inconsistent tariff treatment of goods that Customs later determined should be classified under the same subheading.

The facts of this case illustrate that while some Customs classification rulings may earn the courts' respect under *Skidmore*, the courts should carefully examine such rulings for consistency, persuasiveness, and other characteristics that give interpretive rulings the power to persuade.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully asks this Court to affirm the judgment of the U.S. Court of Appeals for the Federal Circuit.

Respectfully submitted,

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and
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APPENDIX

APPENDIX — REPORT OF THE COAC SUBCOMMITTEE ON OR&R DATED JANUARY 26, 2000

Serko & Simon LLP
Counsellors at Law
Customs & International Trade Law

One World Trade Center — Suite 3371
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January 26, 2000

REPORT OF THE COAC SUBCOMMITTEE ON OR&R

The Committee has completed the first phase of its work plan: if now has information on the current structure, staffing, workload and performance of OR&R. The information confirms the anecdotal information which had created the concern that Customs Headquarters has not been issuing rulings in the timely fashion desired and needed by the trade community. The information also suggests a range of opportunities to improve performance.

The Committee is indebted to Customs, specifically to Stuart Seidel, Assistant Commissioner Office of Regulations & Rulings, John Durant, Director Office of Regulations & Rulings and Jeff Laxague, for its candid and constructive cooperation in this first phase. We wish to report our findings as to performance and the opportunities for improvement. It is our hope that customs will find this a useful report for it

to develop and implement strategies and defined objectives for achieving improvements in its mandated role under the Mod Act in assisting to achieve informed compliance by timely rulings.

Customs developed and provided information on rulings issued in the fiscal year ending September, 1999 — but did not have statistics from earlier years. The complete statistical report (Exhibit 1) is attached to this memorandum, and the following comments about its contents is offered by the Subcommittee.

Customs also provided information showing the structure of OR&R. The attached Diagram (Exhibit 2) demonstrates the range of work handled by ORR. In recent years, the workload of OR&R has expanded as its has taken on new activities, such as training of foreign customs services and issuance of more than fifty (50) Informed Compliance Publications. In fiscal year 1999 (October 1, 1998 to September 30, 1999) Customs issued 11,307 "New York" rulings and 1,261 Headquarters rulings. However, attorney staffing levels fell to 87 in 1999, from a high of 117 in 1990.[1]

While Customs acknowledged at the COAC meeting in Portland on October 8, 1999, that at that time the rulings program as a whole was not an OR&R "priority", we are pleased to report that the subcommittee' review demonstrated Customs has adopted priorities that are reflective of the needs of industry: rulings on prospective business plans are issued

1. As of September 13, 1999 there were 82 attorneys; and 87 attorneys as of October 1, 1999.

more quickly (164 days on average) than ruling on on-going imports (236 days and 277 days on average for internal advice and applications for further review); origin and marking rulings (which affect the packaging decisions which often arise later than production decisions) are made more rapidly (106 days on average) that other substantive decisions (ranging from 174 days for value rulings to 478 days for drawback decisions). The review also demonstrates that Customs National Import Specialists have efficiently and timely issued the "non-controversial" classification, NAFTA and Origin/making rulings within their jurisdiction (20 to 30 days on average).

An apparent indication of improved performance from July 1, 1999 through October 1, 1999 is the reduction of open case backlog from 1,931 pending cases as of July 1, 1999 to 1,651 as of October 1, 1999.[2]

However, the performance today for Headquarters rulings does not meet standards of timeliness. The average times for issuing Headquarters decisions are not short enough to accommodate the needs of businesses seeking advice in advance of importations or production, or seeking resolution of disputes with Customs over the treatment of imports. Six months is too long to wait for value and classification decisions on prospective transactions. 478 days for drawback decisions is unacceptable. In fact, Customs has conceded in written statements to the Congress that it has not achieved its objective to issue rulings within 120 days. We believe

2. Comparison made from use of Exhibit 2 and Exhibit 3. Data obtained from Customs on September 9, 1999.

that Customs does not move as rapidly as other agencies which issue binding rulings to businesses reliance upon agency action. We believe that comparative information and standards should be developed.

The next phase of the work plan is to provide suggestions to Customs to assist its efforts to improve its performance to the point at which United States Customs can safely hold itself out as a model to the world as the most efficient, uniform, predictable and transparent decision-maker on matters affecting imports.

Customs needs to give a priority to improvement in performance: prospective timely rulings are critical for US companies to make decisions to enter into new business activities and to compete globally; other rulings are needed to eliminate uncertainty as to costs after entering into a series of transactions.

We cannot take on the role of managing the OR&R process. However, we can comment on outputs and performance, make recommendations on approaches to improve performance and continue a dialogue with Customs on its performance and plans for improved performance. In this regard, the Committee makes the following observations:

1. The diminished resources and increased workload of ORR should be addressed. The Customs budget should be increased to accommodate the workload so binding rulings can be given their Mod Act priority. Consideration should also be given to reassignment of the other responsibilities such as

training of foreign Customs authorities to other departments, or to the privatization of some of these functions.

2. Customs should explore ways to reduce the number of requests made of it. This might be accomplished by more targeted seminars for importers, issuing binding rulings in a fashion that allows more importers to take advantage of them without making their own requests.

3. Customs should explore more efficient ways to issue "HQ" rulings. This might be accomplished through a streamlined process involving different uses of meetings; including NISs in the process essentially after freeing up their time from diminished numbers of routine requests.

4. Customs should institutionalize a system which measures its performance and establishes targets to be achieved through its performance plan. The reports of performance, improvement plan and goals should be shared with this committee and the import community.

The Committee welcomes the opportunity to work with all members of COAC and with the Customs Service to identify additional opportunities for speeding up the issuance of Headquarters rulings.

Appendix

Respectfully submitted,

/s/ DAVID SERKO
David Serko
Chairman, COAC
Subcommittee on OR&R and
Fermin Cuza
Frank Kelly
Lee Sandler

Distribution: members of COAC and Treasury representatives

Appendix

EXHIBIT 1

[Seal omitted]

United States Customs Service
United States Department of the Treasury

OFFICE OF REGULATIONS AND RULINGS
U.S. CUSTOMS SERVICE
1300 PENNSYLVANIA AVENUE, NW, ROOM 3.4-A
WASHINGTON, D.C. 20229
U.S.A.

TEL: 202-927-0760
FAX: 202-927-1875

FACSIMILE TRANSMITTAL SHEET

DATE: 12-2-99 TOTAL PAGES (+ COVER PAGE): 8

TO: Dave Serko FROM: Jeff Laxague

MESSAGE: Per Mr. Seidel's instructions

Appendix

OR&R Standard Reports for External Distribution
Fiscal Year 1999: October 1, 1999 to September 30, 1999

Appendix

1. Rulings — OR&R Office Totals:

	Oct. 1998 – Sept. 1999	% of total
HQ	1261	10
NY	11307	90
Total	12568	100
Modifications & Revocations	150	1.3
	#	%
Rate increases	32	33
Rate decreases	64	67
Tariff changes	96	100

Appendix

2. HQ Rulings By Type

	Oct. 1998 – Sept. 1999	% of total	Avg # days
Prospective	670	53	164
IA	81	6	236
AFR	302	24	277
Reconsideration	208	17	228
Total	1261	100	206

3. HQ Rulings By Issue

	Oct. 1998 – Sept. 1999	% of total	Avg # days
Classification	806	64	198
Value	186	15	174
Origin/Marking	175	14	106
Drawback	36	3	478
Other	58	4	345
Total	1281	100	206

Appendix

4. NY Rulings

	Oct. 1998 – Sept. 1999	% of total	Avg # days
Classification	11035	98	20
NAFTA	142	1	30
Origin/Marking	130	1	29
Total	11307	100	29

5. Non-Ruling Advice

	Oct. 1998 – Sept. 1999
HQ	
Drawback Contracts	258
IPR Recordations	1220
Total	1478
NY	
CAP (PreClass)	1289
Other Advice	1884
Total	3173

Appendix

6. HQ Open Case Backlog, as of 10-1-99

	# open	%	#>120 days	% of>120	% of total
Class Branches	660	40	425	45	26
Value Branch	132	8	59	6	4
Origin Branch	109	7	55	6	3
Drawback Branch	209	13	109	11	7
Other Branches	541	32	305	32	18
Total	1651	100	953	100	58

Appendix

7. OR&R Staffing Resources

Full-time and part-time, actual on board, October 1999.

HQ:

Attorneys	86
Paralegals	17
Other	18
Sub-total	121

NY:

Import Spec.	98
Other	23
Sub-total	121
OR&R Total:	242

Appendix

8. OR&R Attorney Staffing as of 10-1-99

Branch	Managers	Attorneys	Total
General Class.	1	10	11
Duty & Refund	1	6	7
Textiles	1	9	10
Special Class.	0	7	7
Value	1	8	9
Regulations	1	7	8
Penalties	1	12	13
Entry & Carriers	1	5	6
IPR	0	4	4
FOIA	0	4	4
International	1	3	4
AC	2	2	4
Total	10	77	87

Appendix

9. HQ Resource Utilization

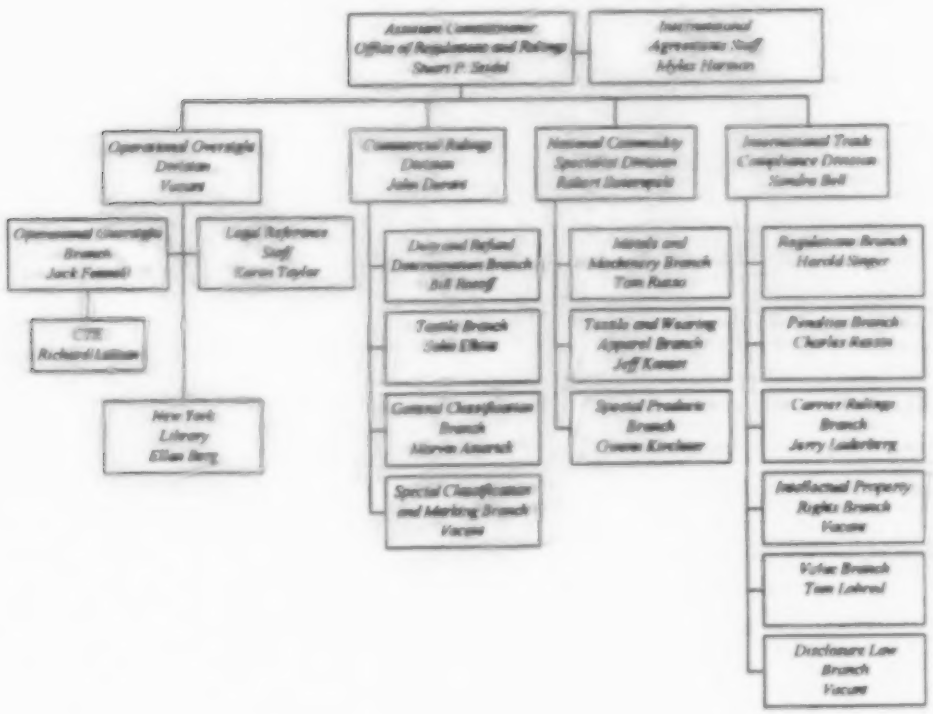
Time Period: October 1, 1998 to September 30, 1999

	% of total
Rulings	45
Informed Compliance	4
Field/HQ Support	16
Congress	2
International	6
Other Agency	2
Regulations	4
Other (Admin)	21
Total	100

Appendix

EXHIBIT 2

Office of
Regulations and Rulings



Appendix

EXHIBIT 3

[Seal omitted]

UNITED STATES CUSTOMS SERVICE
Office Of Regulations & Rulings
1300 Pennsylvania Avenue, NW.
Ronald Reagan Building – 3rd floor
Washington, D.C. 20229

Main Number: 202-927-0760
FAX: 202-927-1875

FAX TRANSMISSION

DATE: 9-30-99

TO: Dave Serko

FROM: Jeff Laxague

COMMENTS: COAC data

Number of Pages 8

Appendix

[Seal omitted]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

September 30, 1999

Mr. David Serko
Chairman, COAC
Subcommittee on OR&R
One World Trade Center
Suite 3371
New York, NY 10048

Dear Mr. Serko:

This is in response to your letter dated September 23, 1999, requesting information on OR&R workload and resources.

The information you requested is enclosed. However, I must qualify the data, by stating that the information is preliminary and not final. We are still validating the data. Also, I would note that the data only covers the time period July 1, 1998 to June 30, 1999. In response to testimony given by the GAO to the Trade Subcommittee on the Ways and Means Committee in 1997, we completely revised our method of tracking and reporting the activities of the office. That new system has only been fully implemented since July 1,1998. We will, however, be updating these tables on a quarterly basis and will be happy to provide you with the most recent statistics.

Appendix

I would be happy to answer any questions you may have about the tables, or you can contact Jeff Laxague of my staff at (202) 927-0505.

Sincerely,

/s/ STUART P. SEIDEL
Stuart Seidel,
Assistant Commissioner
Office of Regulations and Rulings

Enclosures

Appendix

1. Rulings — OR&R Office Totals:

	July 1998 – June 1999	% of total
HQ	1328	11
NY	11229	89
Total	12557	100
Modifications & Revocations	165	1.3

Appendix

2. HQ Rulings By Type

	July 1998 – June 1999	% of total	Avg # days
Prospective	695	52	154
IA	71	5	283
AFR	318	24	281
Reconsideration	244	19	134
Total	1328	100	186

3. HQ Rulings By Issue

	July 1998 – June 1999	% of total	Avg # days
Classification	912	69	199
Value	174	13	150
Origin/Marking	197	15	119
Drawback	31	2	463
Other	14	1	168
Total	1328	100	186

Appendix

4. NY Rulings

	July 1998 – June 1999	% of total	Avg # days
Classification	10986	98	
NAFTA	137	1	
Origin/Marking	100	1	
Total	11229	100	

5. Non-Ruling Advice

	July 1998 – June 1999
HQ	
Drawback Contracts	242
IPR Recordations	1302
Total	1544
NY	
CAP (PreClass)	1315
Other Advice	1435
Total	2750

Appendix

6. OR&R Attorney Staffing as of 9-23-99

Branch	Managers	Attorneys	Total
General Class.	1	10	11
Duty & Refund	1	6	7
Textiles	1	9	10
Special Class.	0	7	7
Value	1	8	9
Regulations	1	7	8
Penalties	1	12	13
Entry & Carriers	1	5	6
IPR	0	4	4
FOIA	0	4	4
International	1	3	3
Total	8	75	82

Appendix

7. HQ Backlog, as of 7-1-99

	# open	%	#>120 days	% of>120	% of total
Class Branches	682	35	361	41	19
Value Branch	147	8	82	9	4
Origin Branch	117	6	48	6	2
Drawback Branch	224	11	121	14	6
Other Branches	761	40	278	31	15
Total	1931	100	888	100	46

Appendix

7. OR&R Staffing Resources

Full-time, actual on board, August 1999.

HQ:

Attorneys	85
Paralegals	17
Other	18
Sub-total	120

NY:

Import Spec.	100
Other	19
Sub-total	119

OR&R Total: 239